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Supreme Court, U.S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

WELLS REAL ESTATE, INC.,
PETITIONER,

v.

GREATER LOWELL BOARD OF REALTORS, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

DAVID F. CAVERS, JR.,
Counsel of Record,
100 Franklin Street,
Boston, Massachusetts 02110.
(617) 357-1500
Attorney for Petitioner

September 21, 1988

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Questions Presented.

I. Does the law on tying arrangements under Section 1 of the Sherman Act permit dismissal of the petitioner's claim under the *per se* or rule of reason standard because of absence of proof of anti-competitive impact in the tied service market notwithstanding proof of anti-competitive impact in another market?

II. Do the waivers by petitioner on the issues of interstate commerce under Sections 1 and 2 of the Sherman Act as found by the First Circuit to preclude further review of the Sherman Act claims except for the tying claim constitute plain error or otherwise merit review by this Court, especially in view of the importance of the underlying facts to the consumer?

List of Parties.

The parties to the proceedings below were the petitioner Wells Real Estate, Inc. and, in addition to the respondent Greater Lowell Board of Realtors, Inc., the respondents named in the footnote below.*

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*National Association of Realtors, Massachusetts Association of Realtors, Walter W. Arakelian d/b/a Arakelian Real Estate, William D. Atherton Realty Corp., George C. Ayotte d/b/a Ayotte Real Estate, Francis M. Bakkar, John Banacos d/b/a Banacos Real Estate, Walter E. Bartkus d/b/a Bartkus Real Estate, Gloria J. Brown d/b/a Gloria Brown Associates, Buckingham Real Estate, Inc., James A. Burns, Jr., Gilbert G. Campbell, Inc., Richard A. Geiger d/b/a Cape Real Estate, Edward F. Chambers d/b/a Chambers Real Estate, Roger Clermont, James A. Kintigos d/b/a Colonial Real Estate Co., Dave Councilman d/b/a Dave Councilman & Co., Ellis Davis d/b/a Davis Realty, Martin F. Delmore d/b/a Martin Delmore Real Estate & Insurance, Gail Downing d/b/a Downing Real Estate, Anne Marie Dube d/b/a Marie Dube Real Estate, George R. Dupee d/b/a George R. Dupee Real Estate & Insurance, Bradford O. Emerson, Inc., Peter De Mogenes d/b/a Garrison Real Estate, Rene E. Gendreau, Peter J. Georges d/b/a Peter J. Georges Real Estate & Insurance, T.J. Higgins Insurance Agency, Inc., Frank E. Jackson Realty, Inc., Henrick F. Johnson, Roy T. Johnson, Anne R. Jones, John J. Lowrey, C. A. Mack Assoc., Inc., Peter Markham, Arthur E. McGlinchy, George D. Meservey d/b/a George D. Meservey Associates, W.C. Muldoon d/b/a W.C. Muldoon Realty, Musket Realty, Inc., Newsham Real Estate, Inc., Robert L. O'Brien d/b/a O'Brien Real Estate, J. J. Reardon d/b/a J. J. Reardon Insurance & Real Estate Agency, Lawrence A. Ross and Dorothy M. Ross d/b/a Ross Real Estate & Insurance Agency, Howard N. Sager d/b/a Sager Real Estate, J. R. Saran d/b/a J. R. Saran & Co., Francis W. Stecchi d/b/a Francis W. Stecchi Real Estate, Douglas R. Johnston d/b/a Stony Brook Realty, Edward J. Talbot, Jr. d/b/a Talbot Insurance & Real Estate, Van Greenby Realty Sales, Inc., Roger P. Welch, Terry Witt d/b/a Terry Witt Realty.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Wells Real Estate, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on June 23, 1988.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit is reported at 850 F.2d 803, and is reprinted in the Appendix A hereto, *infra* at 1a.

Jurisdiction.

Petitioner instituted suit on the basis of federal question jurisdiction pursuant to 15 U.S.C. § 15 and § 16 for violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

The judgment of the Court of Appeals for the First Circuit was entered on June 23, 1988 (Appendix A at 28a). The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Statement of the Case.

Petitioner Wells Real Estate, Inc. (Wells) was started by Mr. George Livadas, a licensed real estate broker, in Burlington, Massachusetts in 1959. Its major focus of business was in the ten towns serviced by respondent Greater Lowell Board of Realtors (GLBOR), with particular emphasis on two towns. From its start in 1959 until 1966 or 1967 Wells grew and prospered. It sold approximately 282 and 288 houses in 1964 and 1965, respectively, representing approximately 21% of the market in the ten towns of GLBOR.

GLBOR has been a Board of Realtors licensed by the National Association of Realtors (NAR) since at least the early 1960's and covers ten towns in the Greater Lowell, Massachusetts area. In 1963 or 1964, GLBOR established a NAR sponsored Multiple Listing Service (MLS) (R. 1673-1674).

A Multiple Listing Service for sale of residential real estate provides a central information service for each home listed and submitted by a member real estate broker. The member broker submits to the MLS a listing describing the property, the offering price, the commission rate, and the portion of the commission, known as the commission split, available to a broker who procures a buyer. The listings are circulated among all of the member real estate brokers, thereby substantially broadening the exposure of the property to potential buyers, the customers of the member brokers.

NAR "sponsors" Multiple Listing Services conducted by its member boards of Realtors, whether as part of the Board or as an affiliate. NAR licenses its "Realtor" trademark to local real estate boards and their broker members in Massachusetts and throughout the United States and the Realtor MLS's are licensed under NAR's service mark.

The state association, Massachusetts Association of Realtors (MAR), is also licensed by NAR under the Realtor trademark.

The state association serves as a liaison between NAR and the local boards.

To participate in the MLS of a Realtor Board, including the MLS of GLBOR, it is required that the real estate broker first join the local board, the state association and NAR. Annual dues are paid by the individual realtor or his or her realtor firm to the local board for redistribution, in pre-determined part, to the state association and NAR.

These dues are calculated in part according to the number of licensed brokers engaged by the member broker. Also, board dues are separate and apart from charges for MLS participation. Board dues can aggregate at least in the hundreds of dollars for each member brokerage organization depending on the number of brokers employed.

NAR requires that the state associations and local boards, including the defendant boards agree to abide by NAR's Constitution and By-laws (R. 643-644, 651) and to obtain NAR's approval of the local board's by-laws (R. 658, 1207). Also, NAR promulgates a Code of Ethics which all Realtor boards and their Realtor members are required to adopt and obey, in Massachusetts and elsewhere (R. 644, 1139). So-called Case Interpretations of the Code of Ethics are issued from time to time by NAR and serve as guidance to the Realtor members; while these interpretations were not binding, at least prior to 1974, they were generally followed (R. 647-649, 928, 929, 1202). NAR's Code of Ethics requires, among other things, that any disputes between member brokers be the subject of compulsory arbitration by the local board and that all board members, whether or not MLS participants, urge the homeowner to enter into what is known as the exclusive right to sell listing and, until its change in form in November, 1971, not to advertise commission rates.

The NAR requirements described above are apart from and in addition to Massachusetts licensing and regulatory standards and procedures for real estate brokers.

NAR also issued a Handbook for Multiple Listing Services to its member boards for use with their MLS. The Handbook served as a guide to the MLS until late 1971, and it was generally followed (R. 1209-1210). In late 1971 it became mandatory, at least in part (R. 661-663). Also, rules and regulations of the MLS of a NAR licensed board, including GLBOR, were required to be approved by NAR commencing in late 1971 or early 1972 (R. 865-867).

In November 1973, NAR passed a by-law forbidding any rule of a local board or state association inconsistent with or contrary to the policy of NAR's board.

The Multiple Listing Service is considered only an "incidental" activity of the Realtor Boards (R. 822-825), in part, at least to maintain the Boards' tax exemptions. Educational and lobbying activities, among other, are engaged in by the Boards. As a general rule, the MLS of the local boards are self-supporting from fees charged for their use without resort to dues charged by the Boards.

The Realtor MLS', including the MLS of GLBOR, is permitted by NAR only to accept the exclusive right to sell listing whereby the homeowner agrees to pay the listing broker's commission in the event of sale during the period of the listing, usually 60 to 90 days, even if the property is sold by the homeowner or another broker (R. 577-579, 582). During the period an exclusive right to sell listing remains in force, no Realtor broker of a Realtor MLS is permitted to approach the homeowner to obtain a listing, even though such proposed listing would not take effect until expiration of the exclusive right to sell listing.

The exclusive agency listing is similar to the exclusive right to sell listing except that the homeowner reserves the right to

sell himself without commission to the broker. These listings were not accepted for listing in the MLS until NAR changed its rule in 1984. The other method of listing used in residential real estate is the open listing, usually an oral undertaking where the homeowner remains free to list with as many brokers as he or she chooses or to sell his or her home without a broker, that is, without payment of commission to a broker. Open listings are not accepted by Realtor MLSs. Most of the listings secured by Wells were open listings.

A property data sheet in a form put forward by NAR is used to aggregate the information used for completion of listing sheets for each property offered for sale through the MLS. The listing sheets are circulated to each member of the GLBOR MLS. These forms required that the Realtor state the applicable commission, rate and the split of commission, in allocated percentage terms, between the listing broker and the selling broker who brings the buyer to the transaction. Until the early 1970's, the members of the MLS of the Greater Lowell Board were required by rule to split on a 60-40% basis, that is 60% to the listings broker and 40% to the selling broker. Thereafter, the written rule was abandoned but the percentage split was generally changed within Greater Lowell's MLS to a 50/50 split (R. 1353-1354).

NAR's 1967 Handbook on Multiple Listing Policy issued to all Realtor MLS "recommended" that the split be on a 60/40 basis. In the succeeding Handbook issued by NAR in 1972, that provision was replaced by a provision encouraging cooperation.

The evidence showed that at least for the years 1977, 1978 and 1979, in the case of co-brokered sales consummated through the MLS of the Greater Lowell Board, a high degree of conformity existed in the commission split. For 1977, 99% of sales through the Greater Lowell Board's MLS were made at the 50/50 split; in 1978, 96% of such sales were made at the

50/50 basis; and in 1979, 96% of sales were split at 50/50 (R. 3407-3409). However, the services performed and costs incurred by the listing and selling brokers, respectively, vary according to the individual transaction (R. 1223-1225).

There was also a high degree of uniformity in the rate of commission appearing on the listing sheets of the MLS members of Greater Lowell. In 1977, 96% of Greater Lowell's MLS listings were at 6% or above; in 1978, 96% were at 6% or above; and in 1979, 93% were at 6% or above (R. 3407-3408).

NAR's Code of Ethics prohibited until late 1971 the advertising by realtors of commission rates. Following repeal of the rule against advertising of rates, the Realtor members of the Greater Lowell Board of Realtors continued *de facto* to refrain from advertising commission rates (R. 930-932, 1118-1119).

The number of brokers participating in Greater Lowell's Realtor MLS substantially increased from the mid-1960's to mid and late 1970's as did the MLS's dollar volume of sales transactions. No other real estate broker board was in existence in the Greater Lowell area except briefly in the early 1970's when a small group of Realtor members of Greater Lowell's MLS formed a competing real estate board. It did not get off the ground (see App. D at 51a, 52a, 53a). However, there was one Realtor Board operating in the Brockton, Massachusetts area where the MLS was not affiliated with the local Board of NAR.

As the Greater Lowell MLS prospered, Wells experienced a continuing decline (R. 1742-1744). Wells found it increasingly difficult to obtain listings because homes offered for sale were tied up, in growing quantities by exclusive right to sell listings mandated by the Greater Lowell MLS at the direction of NAR (R. 2774-2775, 2783-2784). Wells attempted different marketing tactics to counter its decline, including offering and advertising discounts from the prevailing commission rate of the Realtor members of the MLS, to no ultimate avail. Wells' yearly sales of 286 houses in 1965, had declined to 56 houses in 1976. Wells ceased operations in 1979.

At no time did Wells join or attempt to join the Greater Lowell Board of Realtors or its MLS. Wells' principal, Mr. Livadas, was unwilling to agree to the requirements for participation in the MLS.

Petitioner claimed that the Greater Lowell MLS and its members, in collaboration with NAR and the state association, was engaged in an unlawful group boycott because participation in the MLS was conditioned upon the following requirements:

(1) joining the Greater Lowell Board and NAR and the state association, paying their dues and obeying the Code of Ethics imposed by NAR;

(2) limiting the listings in the MLS to exclusive right to sell listings and excluding open listings;

(3) splitting the commission rate between listing and selling brokers in co-brokered sales in the MLS in a pre-determined allocation;

(4) listing residential real estate for sale through the MLS at a rate of commission no less than an agreed minimum rate; and

(5) refraining from advertising any commission rate.

Petitioner also claimed that conditioning participation in the MLS upon membership in the Board of Realtors was an unlawful tie-in under Section 1 of the Sherman Act. Further, petitioner claimed that respondents engaged in an unlawful conspiracy to monopolize the residential real estate brokerage market through their exclusionary and restrictive practices. In that connection, plaintiff claimed that the MLS of Greater Lowell was an essential facility without which a real estate broker could not effectively compete.

The District Court addressed several special questions to the jury under Rule 49(a) of the Federal Rules of Civil Procedure

(see App. B at 29a-31a). The jury's answers were "mixed" although in no instance did the jury answer a special question against defendants NAR or the Massachusetts Association of Realtors. The court below entered judgment on all counts for defendants because of the jury's negative answers to two special questions asking whether the challenged practices substantially affected interstate commerce.

The First Circuit affirmed the judgment for defendants below on essentially two grounds: first, that appellant had waived any right it had to object to the jury's finding of no subject matter jurisdiction and, second, that the tying claim was not supported because there was no showing of anti-competitive injury in the market for the tied service, i.e., real estate boards.

According to the First Circuit, appellant failed to state the law correctly in its objection to the court's special questions on interstate commerce, even though the lower court incorrectly focused its special questions on the alleged unlawful activity of defendants in relation to interstate commerce. Appellant objected on the ground that the questions were not addressed to defendants' general business activities as they related to interstate commerce. According to the First Circuit, appellant should have objected on the ground that the proper question for the jury was whether the defendants' business activities were so connected to interstate commerce that it was logical, as a matter of practical economics, to believe that the unlawful activities will affect interstate commerce. The court also held that appellant had waived its right to object to these questions and related instructions (see App. C at 38a) by failing to object after the court's charge as required by Rule 51 of the Federal Rules of Civil Procedure. The court declined to apply the plain error rule.

The First Circuit also rejected appellant's contention that there was no evidence to support the jury's findings that there

was not the requisite effect on interstate commerce. The court held that appellant had waived its rights on this issue by failing to move for a directed verdict or judgment notwithstanding the verdict or a new trial.

Further, the court rejected appellant's arguments that it was error to submit jurisdictional questions to the jury and that there can be no waiver of subject matter jurisdictional issues. Substantive law and subject matter jurisdiction are closely intertwined in the interstate commerce element of the Sherman Act and, therefore, it was in any event proper to submit the interstate commerce questions to the jury. Also, the court held that the doctrine of non-waiver of jurisdictional objections applies to lack of jurisdiction to adjudicate the case, not to a claim that the jury was mistaken in finding that subject matter jurisdiction did not exist.

Reasons for Granting the Writ.

I. THE FIRST CIRCUIT'S AFFIRMATION OF THE DIRECTED VERDICT AGAINST PETITIONER'S TYING CLAIM UNDER THE SHERMAN ACT ON THE BASIS OF ABSENCE OF PROOF OF ANY ANTI-COMPETITIVE EFFECTS IN THE TIED SERVICE MARKET IS IN DIRECT CONFLICT WITH THE DECISIONS OF SEVERAL OTHER CIRCUIT COURTS AND MISREADS THIS COURT'S OPINION IN *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*.

The First Circuit has joined the Second, Fifth and possibly Ninth Circuits in requiring a private plaintiff to prove anti-competitive effects in the tied product market as a prerequisite to *per se* illegality. This holding is in direct conflict with the law on *per se* tie-ins in the other circuits. Also, it is inconsistent with the decisions of this Court prior to *Jefferson Parish Hos-*

pital Dist. No. 2 v. *Hyde*, 466 U.S. 2 (1984) and inconsistent with the intent of this Court's decision in *Hyde*.

The court also failed to afford petitioner an opportunity to prove its case under the rule of reason of Section 1 of the Sherman Act, assuming *per se* illegality did not apply. Finally, the court ignored an extended offer of proof by petitioner concerning a start-up competing real estate board in the relevant market area.

The First Circuit in *Wells* appears to require for *per se* illegality "some minimal showing . . ., if only as a matter of practical inferential common sense," "of anti-competitive effects in the market for the tied product . . ." (App. A at 23a n.11), as well as evidence that brokers subject to the tie would have purchased membership in a real estate board but for the tie-in. It derives these requirements from the plaintiff's need to show foreclosure of a "not insubstantial" volume of commerce.

This result is necessary, according to the First Circuit, to reconcile otherwise conflicting passages in *Hyde*. In the first passage, the *Hyde* Court stated:

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product *to force the buyer into the purchase of a tied product that the buyer either did not want at all,* or might have preferred to purchase elsewhere on different terms.

466 U.S. at 12 (emphasis added). Then the *Hyde* Court in the context of explaining the "threshold" need for "a substantial potential for impact on competition in order to justify *per se* condemnation," stated:

> Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from

> another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Id. at 16.

It would represent a drastic change in tie-in law to require testimonial proof by purchasers to the effect that they would have bought the tied product from other sellers if they had been free to do so. See *Bogosian* v. *Gulf Oil Corporation*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), where the court stated:

> The antisocial conduct which the rule seeks to deter is the act of the seller conditioning sale of the product upon purchase of another. One can hardly imagine anything which would vitiate that purpose more than a requirement that a violation depends upon proof that the buyer bringing suit would not have purchased the tied product but for the tie requirement. The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's actions.

Id. at 449-450. It is suggested that the *Hyde* Court's statement about the purchaser who would not have bought from another seller was made in the context of *de minimis* impact on competition, for in the preceding sentence the court notes that it would not be enough if only a single purchaser were subject to the tie-in. If several hundred or more purchasers are expressly subject to the tie, in dollar amounts meeting the "not insubstantial" rule, there should at worst be a presumption that some purchasers would have purchased from other sellers if free to do so. In any event, the issue needs clarification.

The First Circuit purported to derive its holding of need for proof of anti-competitive effect in the tied market from the

plaintiff's need to show a "not insubstantial" volume of commerce foreclosed by the tie-in. Petitioner submits that the First Circuit has misread this requirement. It is the dollar volume of the purchases of the tied product subject to the tying arrangement that provides the measure for whether sufficient commerce is in issue. *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969). It is not a volume of commerce calculated on the basis of the expected purchases from other sellers by purchasers of the tied product if they were freed from the tie-in restriction.

For some time prior to the First Circuit's decision in *Wells*, there has been a direct conflict between the Circuits concerning whether anti-competitive effects in the tied product market must be shown for *per se* illegality. The minority rule, that such anti-competitive effects in the tied market are required for *per se* illegality is followed by the Second Circuit, as illustrated by *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974) and *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), and the Fifth Circuit, as shown in *Driskill* v. *Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). The Ninth Circuit has followed these cases on at least some occasions. *Community Builders* v. *City of Phoenix*, 652 F.2d 823 (9th Cir. 1981); *Boddicker* v. *Arizona State Dental Ass'n.*, 680 F.2d 66 (9th Cir.), *cert. denied*, 459 U.S. 837 (1982); but see *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977); *Hirsch* v. *Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1347 (9th Cir.), *cert. denied*, 459 U.S. 973 (1982).

While some of the cases noted above may at least be "narrowed" in impact to the natural monopoly, by fact or law, in the tied product, the breath of the courts' language is not so limited.

The majority of Circuit Courts have followed the teaching of *Northern P. R. Co.* v. *United States*, 356 U.S. 1 (1958), that a *per se* illegal tie-in exists under Section 1 of the Sherman

Act when there are two separate products, the purchase of one conditioned on the purchase of a second, "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not 'insubstantial' amount of interstate commerce affected by the tie-in." 356 U.S. at 6. If these three criteria are met, the tying arrangement has been held unlawful *per se* without further inquiry into the competitive effects of the arrangement with some exceptions unrelated to the case at bar. See, e.g., *Bogus* v. *American Speech & Hearing Ass'n.*, 582 F.2d 277 (3d Cir. 1978); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

If the *Hyde* Court had intended to resolve this conflict among the circuits, surely it would have been more explicit concerning the problem it was addressing, in scope and in terms of past judicial conflict. Also, presumably the court in *Hyde* would have addressed the tied product market itself, assuming there was a separate market, and the state of existing or potential competition within that market, rather than the isolated "forced" purchaser who would not buy the tied product from another seller.

Assuming anti-competitive effects inherent in a tying arrangement subject to *per se* condemnation are confined to effects in the tied product market — whether freedom of the buyer to purchase from others or freedom of competing sellers to sell — it may be that the cases of natural monopoly imposed by the factual setting or by legal requirement do not call for *per se* condemnation. But that issue has not been resolved by this Court and is not posed in the *Wells* case.

Absent a possible natural monopoly exception, it would seem reasonable to presume that the existence of a demand for the tied services or product, presumed from the finding of "not insubstantial" commerce in the tied product, would lead to a compelling inference that there is at least a potential

competing sellers' market for the tied product. The Eighth Circuit in *Rosebrough Monument Co., supra,* took this position:

> Appellees argue that because no companies in the market area provide foundation preparation services for cemeteries, no separate market for that service exists. Their argument fails because the exclusive foundation preparation policy virtually forecloses the existence of companies which would otherwise solely provide foundation preparation services. Further, a separate demand for a product or service may exist although no commercial entities exist that supply that service. This is especially true where a tying arrangement precludes entrance into the underserved market.

666 F.2d at 1142.

To the extent that economic power in the tying product is dominant, it will tend to create a monopoly in the tied product, thereby eliminating actual competitors. In fact, if the tying product power is enhanced by patent or other protection preventing invasion of its domain, the impact on the tied market may be even greater because potential competitors cannot invade the tying product market. It would be anomalous to reward the successful monopolist who is able to extend its monopoly leverage over the tied product market to eliminate all competitors by insulating it from the impact of *per se* condemnation under Section 1 of the Sherman Act.

Admittedly, the First Circuit in *Wells* would not require proof of "the actual scope of anti-competitive effects" in the tied market, provided that plaintiff made a minimal showing of real or potential competition, "if only as a matter of practical inferential common sense." (App. A. at 23a, n.11.) Apparently,

the existence of demand represented by the "not insubstantial" volume of commerce subject to the tie would not satisfy the First Circuit's "practical inferential common sense" for proof of potential competition because the Court stated that "Wells has failed to demonstrate the slightest market for membership in real estate boards" (App. A at 23a). This requirement looks to proof in fact of competing real estate boards, not common sense inference from demand captured by the existing tie-in.

In fact, proof was offered at trial, and rejected by the lower court (and overlooked by the First Circuit although reference was made in the Statement of Facts) of a newly formed real estate board in the relevant market:

> "Each of the gentlemen identified at that meeting by Mr. Livadas, Mr. Kintygos, Mr. Arakelian and Mr. Meservey are defendants in the Greater Lowell action and were realtor members of the MLS. Mr. Livadas if permitted to testify, there were discussions involving himself, those three and two whose names he can not remember concerning starting a competing multiple listing service . . . And that further . . . there was discussion of starting a competing board or association; if you will, of licensed real estate brokers in the Greater Lowell area.
>
> MR. CAVERS: Livadas said in effect look, I'm not against you. Go ahead and start it and if it gets underway, if it gets going I'll then join you.
>
> THE COURT: In other words, he himself would join a real estate board?
>
> MR. CAVERS: He would join this competing board and the MLS that it was.
>
> THE COURT: What does that prove here?
>
> MR. CAVERS:
>
> . . . . . .

> Secondly, the competing board or association of realtors that they talked about, which bore the name for a period Associated Brokers of America, didn't get off the ground. But it tried to get off the ground and tried to run ads. And if the subject, which I disagree with, but if the subject of a competing board competing with the Lowell Board for members for a real estate board is important to the time (sic) claim as at least the defendants seem to allege, that would show there was competition for the market, however brief, for membership in the association of real estate brokers.

(R. 1876-1878.)

. . . . . .

> THE COURT: Did they ever set up a competing board?
>
> MR. CAVERS: No. (sic)
>
> MR. DINSMOOR: No.
>
> MR. CAVERS: I have an advertisement they did set up a board, your Honor."

(R. 1881.)

The court rejected plaintiff's proffer as not having "any relevance to any of the issues" (R. 1880-1881). If proof of the existence of an actual or a potentially competing board of realtors is required, exclusion of this proffered evidence was the death blow to defendant's tie-in case.[1] See *Bolt* v. *Halifax Hosp. Medical Center*, 851 F.2d 1273, 1289 (11th Cir. 1988) ("Other courts have found an abuse of discretion where the probative value of the excluded evidence is high and no other

[1] There was also evidence that in Brockton, Massachusetts, the Realtor Board was independent of the MLS. A proffer relating to the independent operation of California's Realtor Boards from the MLS' to which they were previously aligned by reason of a California Court decree was rejected by the court. Both of these instances support an inference of a demand for real estate board services apart from the MLS.

evidence is reasonably available to prove an essential element of a claim or defense . . ." (citations omitted)).

While *dictum* in certain cases appears to indicate that it is sufficient for *per se* illegality that buyers are forced to forego their free choice by reason of the tie-in, regardless of demonstrable anti-competitive effect, petitioner acknowledges that *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), has likely eliminated any expectation that such deprivation of the buyer's freedom alone supports a tying claim. In response to a dissent in the Circuit Court stating that the Sherman Act prohibited "restrictions on the autonomy of independent businessmen" apart from competitive impact, the *Sylvania* Court stated: "Competitive economics have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks . . ." 433 U.S. at 53 n.21.

Accepting, for argument's sake, that petitioner has shown no actual or potential competition in the tied product market, by direct proof or inference, can petitioner defeat respondent's directed verdict motion on the tying claim by evidence of anti-competitive impact in a market other then the tied product market? If so, is the applicable standard that of *per se* illegality, assuming a "minimal showing of actual or potential competitive" effect in a market causally impacted by the tying arrangement, or rule of reason inquiry under Section 1 of the Sherman Act? The answers to these questions are important, it is submitted, to future interpretation and enforcement of the law applicable to tying arrangements.

Apart from the tied product market, there can be no dispute that there was sufficient evidence to go to the jury on the issue of anti-competitive impact on competition between real estate brokers directly attributed to the tying arrangement. But for the tying arrangement, real estate broker participants in the MLS would not have been required to join the Realtor Boards.

The rules, regulations and practices of those Boards, the tied service, contained or gave rise to substantial anti-competitive restrictions upon the participating broker.[2] Among those restrictions are:

(1) Limitation of listing of residential homes to the exclusive right to sell listing, thereby removing the selling homeowner from the brokerage market for the period of the listing.

(2) Adherence to the Code of Ethics and constitution and by-laws of the National Association of Realtors which require, among other things, mandatory arbitration by a committee of the local Board of all disputes between Realtors.

(3) Split of the commission between the listing broker and the selling broker in a generally agreed allocation, first by rule and thereafter in practice.

(4) Prohibiting advertising of commission rates, whether discounted from the prevailing rate or otherwise.

(5) Listing of homes at a generally agreed minimum rate of commission as demonstrated by practice.

The focus of the tying arrangement upon an association whose members compete with each other is, of course, unlike the usual seller-purchaser arrangement and, therefore, more likely to give rise to anti-competitive effects in the underlying market in which the members compete. Cf. *Boddicker* v. *Arizona State Dental Ass'n, supra,* 680 F.2d at 66 ("The district court found that appellants failed to carry their burden of proving by preponderance of the evidence that the challenged rules suppress competition between dentists. . . . Appellants have presented no arguments to demonstrate any adverse effect on competition between dentists from the challenged rules").

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[2] It may well be that some of the rules of the Realtor Boards have direct relevance to the operations of the MLS without competitive impact. If so, they could have been incorporated in the governing documents of the MLS without requiring Board membership with its full panoply of regulations, whether relevant or not.

But for the tying arrangement requiring membership in the local, state and national Realtor Boards as a condition of participation in the local Realtor MLS, the only MLS competing in the territory, petitioner would not have been subject, if it had participated in the MLS, to the anti-competitive rules and practices of the Boards. Whether the individualistic configuration of anti-competitive impact in this and likely other trade association cases warrants application of a *per se* rule depends at least initially on whether *per se* categorization requires a threshold showing of competitive injury in the tied product market alone. The threshold requirement for *per se* illegality articulated in the *Hyde* opinion, that "there must be a substantial potential for impact on competition in order to justify *per se* condemnation," 466 U.S. at 16, could be met by a preliminary minimal showing of "potential for impact on competition" in a market other than the tied product market provided it is causally linked to the challenged tying arrangement. In any event, petitioner should at least be free, contrary to the ruling of the courts below, to present its case to the jury under the rule of reason concerning the anti-competitive impact of the rules and practices of the "tied" Board because of the tying arrangement.

In sum, petitioner respectfully submits that resolution by this Court of the issues raised by this petition is important for enforcement by the courts of the tie-in laws under the Sherman Act and important to the homeowner whose interests underlie resolution of the legal issues in this proceeding.

II. The Waivers by Petitioner on the Issue of Subject Matter Jurisdiction Constitute Plain Error or Otherwise Merit Review by This Court in Its Discretion, Especially in View of the Importance of This Case to the Consumer.

This case raises vital factual issues intimately affecting homeowners throughout the country (except in California because of a decision of the California Courts). As the record shows, a significant part of the petitioner's challenge under the antitrust laws arises out of rules and regulations imposed by the National Association of Realtors (NAR) upon all of its Realtor members nationally. Such rules include the conditioning of MLS participation upon membership in the local and state boards and NAR and agreement to their rules, dictated in large part by NAR. They also limit MLS listings to the exclusive right to sell listing, facilitate and encourage the fixing of agreed splits of commissions between listing and selling MLS brokers and the maintenance of a minimum commission rate, and eliminate advertising of commission rates, whether or not discounted.

To permit these practices of such detriment to the homeowning consumer to escape full scrutiny under the antitrust laws because of procedural errors of counsel would, it is respectfully submitted, constitute a miscarriage of justice. While acceptance of the petition on the tying claim would certainly go a long way to provide legal scrutiny at the highest level of important substantive issues, the miscarriage of justice occasioned by counsel's waivers will not be fully rectified unless all challenged practices are evaluated in relation to the group boycott and conspiracy to monopolize claims. These substantive issues, and related claimed errors below, were raised on appeal to the First Circuit but not reached because of the waivers of counsel on subject matter jurisdiction.

Counsel for petitioners failed to object to submission of the following special questions to the jury (see App. B at 30a, 31a) even though there was ample evidence, without contradiction, to support a finding of subject matter jurisdiction under the Sherman Act as a matter of law;[3]

> 4. If your answer to Question #3 was "YES", did such acts or practices unreasonably restrain a substantial amount of commerce between the States?
>
> . . . . . .

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[3] Milton Shaw, Chief Executive of the Massachusetts Association of Realtors for twenty years and before that a practicing broker and President of the Boston Board of Realtors, testified:

> Q. Isn't it true that many if not most realtors engaging in residential real estate in this Commonwealth deal from time to time with out of state buyers for property or potential buyers seeking property in this state?
>
> A. Yes.
>
> Q. And is it not true that in numbers of instances in this Commonwealth residential property is financed through banks or other financial institutions which are federally chartered or otherwise connected to the federal government?
>
> A. Yes.
>
> Q. And finally, isn't it true that realtors throughout the Commonwealth advertise residential real estate listed on Multiple Listing Services on many occasions in newspapers or other media which appear not only in the Commonwealth but in part in one or more states in addition to Massachusetts?
>
> A. Yes.

(R. 792-793.)

There was also testimony by individual defendants as well as plaintiff concerning extensive use of federal FHA and VA financing. Also, the nationwide system linking NAR with its local boards and the local board's MLS was based on NAR's interstate license of its trademark "REALTOR" to them, its imposition of rules and regulations upon the local boards, and the remittance by local Boards of a specified portion of member Realtor dues to the national association. Further, NAR spent millions of dollars on national television promoting the "Realtor" concept and distributed abundant educational and other materials to local Boards and conducted courses for hundreds of Massachusetts Realtors, among others. No contradictory evidence was introduced by respondents at trial.

9. Did the exclusion of any real estate brokers from the relevant market for real estate brokerage services substantially affect commerce between the States?

Clearly, it was error of the plainest kind to the utmost prejudice of petitioner not to object[4] at the pre-charge conference or otherwise preserve petitioner's rights on the submission of the interstate commerce issue to the jury absent any evidence to support a jury verdict for defendants.[5]

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[4] Petitioner did submit a Requested Jury Instruction on Interstate Commerce as follows:

> In this case, I instruct you, on the basis of the uncontested evidence presented, that the activities of all of the defendants are in interstate commerce and, therefore, this element of the case is satisfied.

(Requested Instruction No. 19.)

No further reference was made by any party or the Court to this Requested Instruction, to petitioner's misfortune. Also, defendants Greater Lowell Board of Realtors, the Massachusetts Association and NAR moved to dismiss for lack of subject matter jurisdiction. After extensive discovery, these motions were denied by a predecessor judge on August 28, 1978.

[5] The First Circuit based its finding of waiver on the issue of insufficiency of evidence to go to the jury on interstate commerce on the failure by petitioner's counsel to move for a directed verdict, judgment n.o.v. or new trial. Generally, motions for a directed verdict or judgment n.o.v. are addressed to the merits, not to subject matter jurisdiction, and the fact finder's verdict is *res judicata* upon the parties. See 10 Wright & Miller, Federal Practice, Civil 2d § 2713.1; Cf. *Prakash* v. *American University*, 727 F.2d 1174 (D.C. Cir. 1984). (Summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure not appropriate for subject matter jurisdiction.)

Although not relied upon by the First Circuit in this respect, it may be maintained that the intermeshing or intermingling of the issues of substantive law and subject matter jurisdiction require submission of these special questions to the jury. See *Thornhill Pub. Co.* v. *General Tel. & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979). The court's phrasing of the special questions 4 and 9 (#4: "did such acts or practices unreasonably restrain." #9: "did the exclusion of any real estate brokers. . .") exacerbated any possible intermeshing for it directly asked whether the unlawful act, if it existed, affected or restrained a substantial amount of interstate commerce. Notwithstanding contrary state-

Petitioner's waiver with respect to the content of the special questions and instructions on interstate commerce and subject matter jurisdiction, amounted to plain error, in petitioner's judgment, notwithstanding the First Circuit's finding to the contrary (App. A at 12a-13a).

Contrary to *McLain* v. *Real Estate Bd. Inc.*, 444 U.S. 232 (1980), the District Court's special questions on interstate commerce specifically asked whether the alleged unlawful activity substantially affected interstate commerce. This was clearly error, notwithstanding the waiver by counsel for petitioner, and clearly prejudiced the jury in finding against petitioner in the answers to questions 4 and 9.

The First Circuit correctly found that petitioner's counsel failed to phrase his objection to the court's special questions at the charge conference in the language of the First Circuit Court's holding in *Cordova and Simonpietri Ins. Agency, Inc.* v. *Chase Manhattan Bank, N.A.*, 649 F.2d 36, 45 (1st Cir. 1981). Counsel objected on the grounds that "activities of the defendant generally, illegal or legal," needed to be in or affecting commerce, not the alleged illegal acts alone. The *Cordova* court held that defendants' business activity "must be so connected with interstate commerce that it is logical, as a matter of practical economics, to believe that the unlawful activities will affect interstate commerce."

The procedural error of petitioner's counsel could not have been plainer, for counsel's mischaracterization of *Cordova* prevented application of the facts of this case to the interstate commerce test of *Cordova*. The challenged conduct of respondents goes to the very core of their operation of real estate

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ments by a number of courts, there is no reason, in petitioner's judgment, that the subject matter jurisdiction element is necessarily intermeshed with the substantive element. *Gough* v. *Rossmoor Corp.*, 487 F.2d 373, 376 (9th Cir. 1973). In any event, appropriate clarifying instructions or modifications to the special questions could have been given to avoid undue confusion to the jury.

boards and multiple listing services and pervades numerous facets of their operations. It does not require logic of whatever description to believe that the challenged activities will affect interstate commerce for such activity overlaps and coincides with the general business activity of defendants in substantial part. Once again, counsel's procedural error gravely prejudiced petitioner for it resulted in a finding which precluded consideration of the important substantive issues of the case.

Two questions of law emerge from this consideration of interstate commerce and subject matter jurisdiction which are of significance to the antitrust laws:

(1) If *Cordova* is the appropriate standard under *McLain*, is it for the jury to determine whether "it is logical as a matter of practical economics" to determine that the unlawful activity is sufficiently connected to the interstate business activities of a defendant generally. The jury is a finder of fact, not an expositor of logic, whether of "practical economics" or otherwise. Is it not more consistent with the respective functions of judge and jury for the jury to determine whether the defendants' general business activities are in or affect interstate commerce, and if the answer is "yes", for the court to determine if the practical economics logical connection can be made to the challenged activities? Is not the *Cordova* standard also too complex in the relationship it demands be drawn to expect a jury to understand the task assigned to it? If this suggestion is correct, then the content of petitioner's objection was correct. Also, the First Circuit's stated reason for withholding the plain error exception (App. A. at 13a), would be inapplicable.

(2) The Supreme Court has yet to rule whether *Cordova* is consistent with the *McLain* decision. As the First Circuit recognized, there is language in *McLain* suggesting to the contrary. 850 F.2d at 808. Also, the 9th Circuit interprets

> *McLain*, in conflict with *Cordova*, to require proof only that defendants' business generally affected interstate commerce. *Western Waste Service Systems* v. *Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir. 1980), *cert. denied*, 449 U.S. 569 (1980).

Petitioner recognizes that this Court is not limited to the "plain error" exception applicable to the circuit courts. See, e.g., *Newport* v. *Facts Concert, Inc.*, 453 U.S. 247 (1981); Supreme Court Rule 34(1)(a).

But petitioner respectfully suggests that clarification of the standards for application of the plain error doctrine at the circuit court level might avoid the present lack of uniformity between circuits. The Ninth Circuit, *de jure*, *Bock* v. *United States*, 375 F.2d 479, 480 (9th Cir. 1967), and the First Circuit, *de facto*, do not apply the plain error exception in civil cases.[6] All of the other Circuits, to the best of petitioner's knowledge, apply in fact the plain error doctrine although with varying degrees of liberality. It may not be desirable, given the discretionary nature of the plain error doctrine, or even possible to articulate a plain error standard with precision, but a guideline designed to bring the aberrant Ninth and First Circuits into the fold of the other Circuits would enhance uniform application of the plain error exception.

Beyond the procedural plain errors of petitioner's counsel which will, if uncorrected, result in a miscarriage of justice, and beyond the ramifications of *Cordova* discussed above, looms the significant importance of this case to the consumer.

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[6]The First Circuit first acknowledged the "plain error" exception in civil cases in 1966 in *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966). In its *Wells* opinion in 1988, twenty-two years later, the First Circuit admitted that "we have continued to acknowledge the plain error rule without, to our knowledge, ever using it to upset a verdict . . ." (citations omitted). (App. A at 11a-12a.)

Antitrust law is the vehicle for legal challenge but the consumer is the intended beneficiary. If plaintiff is able, through this petition and thereafter, to prevail on at least the tying claim, if not the boycott and conspiracy to monopolize claims, the benefits of competition will be passed on to the homeowner. Except for a now historical incursion into the residential real estate industry, *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), this Court has not had an opportunity to examine the legality of the governing rules and practices of the behometh National Association of Realtors, the largest trade organization in the nation, and its satellite state associations, local Realtor Boards and thousands of individual realtors. No other court at the federal level has had the opportunity to address the full range of substantive antitrust issues to which such rules and practices give rise. See, e.g., *Park* v. *El Paso Bd. of Realtors*, 764 F.2d 1053 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Penne* v. *Greater Minneapolis Area Board of Realtors*, 604 F.2d 1143 (8th Cir. 1979); but see *People* v. *National Ass'n of Realtors*, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728, 732-735 (1981); *People* v. *National Ass'n of Realtors*, 155 Cal. App. 3d 578, 207 Cal. Rptr. 243 (1984) (the California state decision against NAR and the state and local associations on a tying claim brought under a state statutory equivalent of the Sherman Act); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (the court addressed under the Sherman Act restrictions locally imposed in the real estate industry analogous in certain respects to the case at bar).

The antitrust issues of boycott and conspiracy to monopolize, including underlying issues of price fixing and conscious parallelism "plus," are important and complex [7] as is the tying claim.

[7] The First Circuit stated, in a footnote to its discussion of the tying claim: "Whether it is an unlawful group boycott or an illegal example of price-fixing is a much more complex question. *See United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980)." (App. A at 24a n.12.)

But the need for judicial evaluation and, if appropriate, direction and revision of the method of operation of the residential real estate market under the control and supervision of the National Association of Realtors is the most important issue at stake. For petitioner's substantive claims portray a system and its practice which does away with the benefits of free competition among real estate brokers to the detriment of the consumer, the homeowner.

If the Court should accept certiorari on this second request, petitioner respectfully suggests that at least two alternate courses of action would be available: either (i) accept the petition for consideration of the substantive issues addressed on appeal to the First Circuit but which, except for the tying issue, were generally unaddressed by the First Circuit due to the waivers of petitioner's counsel on interstate commerce, or (ii) accept the petition in respect to whether the plain error doctrine as applied by this Court or through an amplified scope of review merits remanding the case for a new trial on all substantive issues.

Conclusion.

For these several reasons, this petition for certiorari should be granted.

Respectfully submitted,

DAVID F. CAVERS, JR.,
Counsel of Record,
100 Franklin Street,
Boston, Massachusetts 02110.
(617) 357-1500
Attorney for Petitioner

September 21, 1988

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Appendix A.

WELLS REAL ESTATE, INC.,
Plaintiff, Appellant,

v.

GREATER LOWELL BOARD OF REALTORS, et al.,
Defendants, Appellees.

No. 87-1238

United States Court of Appeals,
First Circuit.

Heard Feb. 1, 1988.

Argued June 23, 1988.

David F. Cavers, Jr., with whom Richard W. Mable and Powers & Hall, P.C., were on brief, for plaintiff, appellant.

John M. Harrington, Jr., Boston, Mass. (for defendant, appellee Nat. Ass'n of Realtors) with whom Thomas H. Hannigan, Jr., Ropes & Gray, Stuart T. Rossman, Gaston Snow & Ely Bartlett, Elizabeth M. Fahey, Morrison, Mahoney & Miller, David M. Roseman, Andrew M. Higgins, and Casner, Edwards & Roseman, Boston, Mass., were on consolidated brief for defendants, appellees.

Theodore E. Dinsmoor, Boston, Mass., for defendants, appellees Greater Lowell Bd. of Realtors, Inc., its individual members, Greater Boston Real Estate Bd., Inc., and Greater Salem and Lynn Boards of Realtors, Inc.

D. Alice Olsen, Boston, Mass., for defendants, appellees Eastern Middlesex, and Quincy and South Shore Boards of Realtors, Inc.

Before COFFIN, Circuit Judge, ALDRICH, Senior Circuit Judge, and PETTINE,* Senior District Judge.

COFFIN, Circuit Judge.

This is the anticlimactic end of a prolonged antitrust litigation involving two consolidated suits over the course of more than fifteen years. Although a number of interesting issues were argued on appeal, most of them fall by reason of the jury's finding that plaintiff had failed to establish that defendants' activities had a substantial effect on interstate commerce, a necessary element for liability under the Sherman Act. We affirm the judgments.

I. FACTS

The plaintiff, Wells Real Estate, Inc. ("Wells"), was a real estate brokerage located in Billerica, Massachusetts. Wells was started by George Livadas in 1959 in Burlington, Massachusetts. Its major focus of business was homes in the Lowell area, in particular those in the towns of Billerica and Tewksbury. Until 1966 or 1967, Wells prospered. In the early 1960s, Mr. Livadas attempted to expand the brokerage, through separate corporations, to other areas of Massachusetts. But in the middle of that decade, Wells was suddenly faced with the growing threat of serious competition from the defendant realtors comprising the Greater Lowell Board of Realtors (the "Lowell Board"), another defendant in this case. In re-

*Of the District of Rhode Island, sitting by designation.

sponse to this competition, Livadas reconsolidated all of Wells' operations in the Burlington office, which was later moved to Billerica.

Ever greater numbers of realtors were drawn to the area by the advantages offered by the Lowell Board. In particular, the Board provided a "multiple listing service" ("MLS"), which enabled member brokers to cooperate on the sale of a much larger number of houses than if they remained independent. Board members submitted their procured listings for houses to the Board. The list of all of the members' houses was then available to the entire membership to try to sell. When a house was sold, the profit would be split in some agreed upon percentage between the listing broker and the selling broker. The rate of commission was set by the listing broker. According to evidence submitted by the plaintiff at trial, the rate of commission was almost always about 6 percent, and the commission split between lister and seller was invariably 50 percent/50 percent of that rate. As a condition of membership in the Board, a realtor was required to adhere to the constitution and by-laws of the national sponsor of the local board, the National Association of Realtors (the "NAR"). The NAR, also a defendant here, establishes methods of arbitration between realtors, and a basic set of rules by which board practices, including the MLS, are to be run. The NAR also imposes on its member boards and realtors a national Code of Ethics for real estate sales.

The MLS dramatically increased the number of brokers in the greater Lowell area. Wells' percentage of sales began to drop precipitously. Wells was further disadvantaged by the fact that the listings in the MLS were all "exclusive right to sell" listings, wherein the homeowner agrees to pay the broker the commission rate even if the house is sold by another broker or by the homeowner. This practice effectively removed all

MLS houses from the rest of the market, and thus precluded non-member realtors from attempting to broker those sales.[1]

Wells chose not to join the Lowell Board. Mr. Livadas preferred the old fashioned method, whereby everyone hunted down his own listings and had to be quick to close sales in order to beat the other brokers to the punch. Wells had prospered as long as that was the prevailing method. Livadas eschewed the MLS, apparently because he did not share its members' implicit belief in the benefits of cooperation. He testified that "[m]y job is to earn a living and not to facilitate other brokers to get listings." The MLS, in his opinion, eliminated the rewards for the hard-working realtor by letting some realtors get by on simply collecting the commission split on sales without having to do the groundwork of procuring the listing. His description of the changing market revealed a nostalgia for the good old days, when profits were proportional to time and effort: "[Before the MLS] it was a real competition. And the good ones survived and the lazy ones would die. But today you have the opposite, . . . the parasites. The lazy ones survive because the system allows them to survive." Most of Wells' listings remained open, because of the competitive pressures imposed by the MLS.

In part because of Livadas' principled intransigence, Wells' fortunes quickly evaporated. Its market share in the area was about 21% in 1965, with annual sales of 286 houses. By 1976, Wells could sell only 56 houses. Meanwhile, the Lowell Board

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[1] The other two common types of listings, which provide far less security for the brokers utilizing them, are the "open" listing and the "exclusive agency" listing. An open listing is an agreement that the broker will get the commission only if that broker procures the buyer. This enables the homeowner to list with multiple brokers but pay a commission to only one. This naturally provides for far less security for the broker and far more competition between brokers. The exclusive agency listing is the same as the exclusive right to sell listing, except that the broker does not receive a fee if the homeowner sells the home.

MLS's share of the market increased from approximately 36% in 1964 to about 53% in 1978. Wells was soon heavily in debt, and had to cease operations in 1979.

In 1972, Wells brought suit against the Lowell Board of Realtors and its individual members for various violations of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 & 2. Wells alleged both a boycott of Wells from the MLS and a conspiracy to monopolize the local real estate industry. Wells also claimed the the MLS constituted an illegal tying arrangement, wherein access to the listings (the tying product) was impermissibly conditioned on membership in the Board with all its attendent conditions (the tied "product"). In addition, Wells alleged various price fixing violations, claims that were dismissed on summary judgment in 1984. This 1972 action also named as defendants the National Association of Real Estate Boards (now the NAR), and the state "parent" real estate boards of both Massachusetts and New Hampshire. The New Hampshire State Board was dismissed by the court in 1981.

In 1973, Wells instituted a similar action against all of the other local real estate boards in Massachusetts, on the theory that Wells effectively was deterred from entering those markets by similar MLS schemes statewide. The price-fixing claims were dismissed by the court at the outset of trial in January 1987, and shortly thereafter Wells filed stipulations of dismissal with respect to all claims against all but five of the local boards in the 1973 case.

Wells contended that the Boards restrained competition by preventing access to the exclusive listings of the MLS; that the MLS members conspired to set uniform commission rates throughout the market; and that the realtors on the boards illegally set uniform commission "splits" for distributing the profits made off of the MLS. Wells claimed that these practices effectively served as an illegal boycott against those unwilling to join the boards. Plaintiff's primary argument was that access to the MLS should not have been conditioned on joining the

boards, adhering to the rules established by the boards, and acceding to the conditions of sales and commissions required by the boards for access to the MLS. Wells also contended that the brokers illegally conspired to exclude others from the market so as to achieve a monopoly therein. The conspiracies to boycott and monopolize allegedly caused a substantial reduction in competition amongst brokers in the area and unreasonably restrained a substantial amount of interstate commerce.

The cases were consolidated for trial, which finally began in early 1987. At the close of the plaintiff's evidence, the court directed verdicts for the remaining five boards in the 1973 case. At the close of all the evidence, the court directed a verdict for the remaining defendants (those from the 1972 case) on the tying claim. The remainder of the case was submitted to the jury on a special questionnaire. The jury was asked to answer specific interrogatories regarding the group boycott and conspiracy to monopolize claims. Based on the jury's answers to those questions, judgment was entered for all defendants on each remaining count.

Wells appeals that jury verdict on numerous grounds, including, *inter alia*, that the jury was wrongly instructed on interstate commerce; that the jury's findings on interstate commerce were not supported by the record; that the court's instructions on causation of injury were erroneous; that the verdict was inconsistent; and that the court failed in the instructions properly to distinguish between per se and rule of reason standards for testing antitrust violations. Plaintiff also appeals the directed verdicts in favor of the 1973 case defendants, and the directed verdicts for the remaining defendants on the tying claim. Finally, Wells finds fault with numerous evidentiary and pre-trial discovery rulings made by the court.

II. THE JURY VERDICTS

On both the boycott and the monopoly claim, the district court properly found that the jury's answers to the special inter-

rogatories could not support a verdict for the plaintiff. In particular, the jury found that although the activities of some of the defendants did deny Wells access to the MLS, unreasonably exclude brokers from the market, and cause a substantial reduction in competition within that market,[2] such activities (1) were not the predominant cause of Wells' decline and fall, and (2) did not unreasonably restrain a substantial amount of commerce between the states.[3] We need not discuss the causation element, nor any of defendants' other theories of liability, because we find that the plaintiff has failed to establish a requisite finding of effect on interstate commerce to satisfy that necessary element of its Sherman Act claims. Such a failure is dispositive of the claims.

A. *Improper Instructions on Interstate Commerce*

Plaintiff now claims that the jury was improperly instructed on the interstate commerce element of Wells' claims. On each count, the jury was asked whether the defendants' allegedly anticompetitive activities "unresonably restrain[ed] a substantial amount of commerce between the states." On both counts, the jury answered "no." Appellant argues that it was improper to constrict the focus of the interstate commerce element to the *challenged* activities of the defendants. Instead, Wells contends, the questions should have been (1) whether defendants' activities *generally* were in or affected interstate commerce, and then (2) whether there was a connection, "in practical economic terms," between defendants' activities generally

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[2] The jury unequivocally found that the plaintiff had failed to prove that the activities of the national and state board of realtor defendants had any noncompetitive effect.

[3] There were various other theories on which the defendants argued that the jury answers necessitated judgment in their favor, but the district court relied solely on the two reasons mentioned in the text.

and those particular activities challenged in the lawsuit as anticompetitive.

If we could consider the argument, it would have substance. In *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), the Supreme Court held that an antitrust plaintiff does not have to prove a direct, "particularized" connection between the challenged activity and interstate commerce. 444 U.S. at 242-43, 100 S.Ct. at 509-10. "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." *Id.* at 243, 100 S.Ct. at 509 (citations omitted).

[1] But despite some language suggesting the contrary in *Mclain, see id.* at 242, 100 S.Ct. at 509, neither is it sufficient merely to show that some aspect of the defendant's activity generally had a substantial effect on interstate commerce. If that were the case, the interstate commerce element would invariably be satisfied without even an inkling of proof that the challenged activity was in any way connected to that part of the defendant's business that affected interstate commerce. Rather, we have held, in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 45 (1st Cir.1981), that the proper focus is on language found later in *McLain*, emphasizing "the requirement that [defendants'] activities which allegedly have been infected by a[n] [anticompetitive] conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." 444 U.S. at 246, 100 S.Ct. at 511 (quoting *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 745, 96 S.Ct. 1848, 1852, 48 L.Ed.2d 338 (1976)).

We have interpreted *McLain* as holding that "a plaintiff need not prove that a defendant's unlawful activities *actually* affected

interstate commerce; but . . . [rather] that defendants' business still must be so connected with interstate commerce that it is logical, as a matter of practical economics, to believe that the unlawful activity will affect interstate commerce." *Cordova & Simonpietri*, 649 F.2d at 45. This reading has been adopted by numerous other circuits as well. *See, e.g., Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 & n.2 (6th Cir.1987); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir.1985); *Hayden v. Bracy*, 744 F.2d 1338, 1343 & n.2 (8th Cir.1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-26 (2d Cir.1983); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 720-24 (10th Cir.1981) (en banc). *But see Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.1980) (only defendant's business generally need affect interstate commerce). It is this standard that appellants urge on us here, and we agree that it would have been proper to instruct the jury in such a manner.

[2] Unfortunately for plaintiff, however, Wells' attorneys did not ask for the "practical economics" instruction at the charge conference prior to closing arguments. Instead, counsel proffered precisely the interpretation of *McLain* that we rejected in *Cordova & Simonpietri*. App. 3481-83. "My only point," counsel contended, "is my understanding of *McLain* as well as the *Cordova* case is it is not the alleged illegal acts that need to be in commerce, but rather activities of the defendants generally, illegal or legal." *Id.* at 3482-83. This request was properly rejected by the court, as it does not comport with our reading of *McLain*.[4] *See Ouimette v. E.F. Hutton & Co.*,

[4] Similarly, plaintiff's submitted requested instruction was: "It is sufficient, in the case of each defendant, that its activities either cross state lines or had a substantial impact on interstate commerce." App. 3143. Though some of the examples thereafter provided would properly satisfy the interstate commerce element as described in *Cordova & Simonpietri*, the requested standard was not sufficiently precise, and arguably mischaracterized the plaintiff's burden.

Inc., 740 F.2d 72, 76 (1st Cir.1984) ("a requested instruction to the jury may be correctly refused if it is improper or erroneous"). Although the court's eventual instruction to the jury erred in the other extreme, plaintiff never asked for a correct definition of the interstate commerce element. An exception on one ground cannot serve as the basis for another, on a different ground, on appeal. *Gillentine v. McKeand*, 426 F.2d 717, 723 n.19 (1st Cir.1970).[5]

Even if plaintiff's requested instruction had been proper, counsel failed to raise that objection again subsequent to the actual charge. According to a long line of precedents in this circuit, such an omission constitutes waiver of the objection pursuant to Federal Rule of Civil Procedure 51.[6] *See, e.g., Brown v. Freedman Baking Co., Inc.*, 810 F.2d 6, 9 (1st Cir.1987); *Coy v. Simpson Marine Safety Equipment, Inc.*, 787 F.2d 19, 26 (1st Cir.1986); *Emery-Waterhouse Co. v. Rhode Island Hosp. Trust Nat'l Bank*, 757 F.2d 399, 411 (1st Cir.1985); *McGrath v. Spirito*, 733 F.2d 967, 968-69 (1st Cir.1984); *Monomoy Fisheries, Inc. v. Bruno & Stillman Yacht Co.*, 625 F.2d 1034, 1036 (1st Cir.1980); *Carrillo v. Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir.1975); *United States v. Taglianetti*, 456 F.2d 1055, 1056-57 (1st Cir.1972); *Rivera v. Rederi A/B Nordstjernan*, 456 F.2d 970, 976 (1st Cir.1972);

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[5] Assuming that counsel meant by his vague statements to suggest the definition of the interstate commerce he now urges us to adopt, such a request was not made with sufficient "distinctness" to satisfy the dictates of Federal Rule of Civil Procedure 51. *See, e.g., Elwood v. Pina*, 815 F.2d 173, 175-76 (1st Cir. 1987); *Jordan v. United States Lines, Inc.*, 738 F.2d 48, 51 (1st Cir.1984). "Objections must be 'sufficiently specific to bring into focus the precise nature of the alleged error.'" *Gay v. P.K. Lindsay Co., Inc.*, 666 F.2d 710, 712 (1st Cir.1981) (quoting *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645 (1943)).

[6] Rule 51 reads in pertinent part: "No party may assign as error the giving [of] or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Dunn v. St. Louis-San Francisco Ry. Co., 370 F.2d 681 (10th Cir.1966) (Aldrich, J., sitting by designation); *Marshall v. Nugent*, 222 F.2d 604, 615 (1st Cir.1955).

In this case, the court gave counsel abundant opportunity to object to the charge after it was given. An extensive post-charge conference was held with all counsel present. Counsel for the defendants took numerous exceptions to the charge. Plaintiff's attorney did reiterate several of his prior requests and exceptions, but with no mention of interstate commerce. Given this "ample opportunity" at the post-charge conference, appellant cannot now be said to have avoided waiver of its exception to the interstate commerce charge. *See Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir.1987).

With that waiver, the instruction as given becomes the law of the case. *See Shepp v. Uehlinger*, 775 F.2d 452, 455-56 (1st Cir.1985) (citing *Moomey v. Massey-Ferguson, Inc.*, 429 F.2d 1184, 1187 (10th Cir.1970)). That being so, the jury's answers leave appellant without any finding of the necessary element of interstate commerce. Without that finding, appellant has not met its burden of proving a Sherman Act violation.

[3] We have recognized a "plain error" exception for failures to adhere to Rule 51. However, the plain error rule "should be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice." *Nimrod v. Sylvester*, 369 F.2d 870, 873 (1st Cir.1966). We have adopted the standard for plain error in the Rule 51 context expressed by professors Wright and Miller: " 'If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir.1976) (quoting 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2558, at 675 (1971)). At the time *Morris* was decided, we had never reversed a civil case on this basis, 528

F.2d at 859, and we have continued to acknowledge the plain error rule without, to our knowledge, ever using it to upset a verdict. *See, e.g., Elwood v. Pina,* 815 F.2d 173, 176 (1st Cir.1987). *Almonte v. National Union Fire Ins. Co.,* 787 F.2d 763, 769 (1st Cir.1986); *Coy v. Simpson Marine Safety Equipment, Inc.,* 787 F.2d 19, 26 (1st Cir.1986); *Ouimette v. E.F. Hutton & Co., Inc.,* 740 F.2d 72, 76 n.4 (1st Cir.1984); *McGrath v. Spirito,* 733 F.2d 967, 969 (1st Cir.1984). We find no exceptional or peculiar circumstances that make the present case any different. The plain error exception is inappropriate here, especially since plaintiff's requested instruction at the pre-charge conference represented a misstatement of the applicable law.

B. *Judgment Notwithstanding the Verdict*

Appellant argues in the alternative that the jury's answers on interstate commerce were wrong, that there was "no evidence to support the jury's findings that there was not the requisite effect on interstate commerce." Appellant asks that we "reverse" the jury's findings.

[4-8] We do not reach the issue of the sufficiency of the evidence, however, because plaintiff's counsel failed to move for a judgment notwithstanding the verdict in the district court. Therefore we have no decision of the district court to consider. In fact, plaintiff failed to move at any time for a directed verdict under Federal Rule of Civil Procedure 50(a). Motion for directed verdict must be made at the close of all evidence; moving at the close of one's opponent's evidence generally will not suffice. *See, e.g., R & R Associates, Inc. v. Visual Scene, Inc.,* 726 F.2d 36, 38 (1st Cir.1984).[7] The motion must

[7] Under very rare circumstances, such a motion need not be repeated at the close of all evidence if such a repetition is clearly superfluous or futile. *See Beaumont v. Morgan,* 427 F.2d 667 (1st Cir.1970); *Bayamon Thom McAn, Inc.*

also be made with sufficient specificity to allow the district judge to understand precisely why the evidence is insufficient. Appellate review may be obtained only on the specific ground stated in the motion for directed verdict. *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 3 (1st Cir. 1977). A motion under Rule 50(b) for judgment notwithstanding the verdict cannot be made unless the motion for directed verdict was properly brought before the court. *Javelin Investment v. Municipality of Ponce*, 645 F.2d 92, 94 (1st Cir. 1981).

"[A] federal appellate court may not reverse for insufficiency of the evidence in the absence of an unwaived motion for directed verdict." *LaForest v. Autoridad de Las Fuentes Fluviales de Pureto Rico*, 536 F.2d 443, 445 (1st Cir. 1976). See also *Javelin Instrument*, 645 F.2d at 94. Plaintiff in this case did not make any motion at any time for a directed verdict or a judgment notwithstanding the verdict on the issue of interstate commerce. The court was never asked to withhold the interstate commerce question from the jury because of undisputed evidence on that issue, despite ample opportunity for counsel to do so. Therefore, we cannot review a claim of insufficiency of the evidence.

C. *New Trial.*

[9] Waiver of the right to request judgment notwithstanding the verdict does not, however, preclude a party from moving for a new trial. See *Della Grotta v. Rhode Island*, 781 F. 2d

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v. Miranda, 409 F.2d 968 (1st Cir. 1969). However, such a case will be unusual, existing only when the additional evidence is so insubstantial as to make no possible difference as to sufficiency, and when, as in *Bayamon Thom McAn*, the lag between the close of plaintiff's evidence and the end of trial is negligible. See *Della Grotta v. Rhode Island*, 781 F.2d 343, 350 (1st Cir. 1986); *Martinez Moil v. Levitt & Sons of Puerto Rico, Inc.*, 583 F.2d 565, 569-70 (1st Cir. 1978); *Gillentine v. McKeand*, 426 F.2d 717, 722-23 (1st Cir. 1970).

343, 350 (1st Cir. 1986). Appellant now asks us to order a new trial because the jury's verdict on the interstate commerce issue is against the weight of the evidence. But here, too, counsel's failure properly to preserve this contention forecloses review in this court.

[10] "The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). *See also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984) (error for appellate court not to defer to discretion of trial court in decision on new trial). Only an abuse of that discretion will trigger reversal of a denial of a motion for new trial. *See Conway v. Electro Switch Corp.*, 825 F.2d 593, 598 (1st Cir. 1987); *Sprague v. Boston & Maine Corp.*, 769 F.2d 26, 27-28 & n. 3 (1st Cir. 1985), and cases cited therein. This is especially true where the motion for new trial is made because the jury's verdict allegedly is against the weight of the evidence. *See Keeler v. Hewitt*, 697 F.2d 8, 11 (1st Cir. 1982). That is the sort of decision most appropriately left to the broad discretion of the trial court, because it is directly predicated on the facts and evidence adduced at trial, and because a jury's verdict on the facts should only be overturned in the most compelling circumstances.

[11] "Where . . . the district court's ruling would call into play a discretionary matter, peculiarly appropriate for that court, it becomes more important to bring the error first to that court's attention." *Sampson v. Eaton Corp.*, 809 F.2d 156, 161 (1st Cir. 1987). Thus, a motion for new trial must be made in the first instance before the trial court, particularly where the weight of the evidence is at issue. See 6A *Moore's Federal Practice* § 59.15[3], at 326-27 (2d ed. 1987). *Cf. Carlton v. H.C. Price Co.*, 640 F.2d 573, 577 (5th Cir. 1981)

(no appellate review of allegedly excessive or inadequate damages where trial court not given opportunity to exercise its discretion on the matter); *Braunstein v. Massachusetts Bank & Trust Co.*, 443 F.2d 1281, 1285 (1st Cir. 1971) (same). Such a motion must be made not later than ten days after the entry of judgment. Fed.R.Civ.P. 59(b).

Plaintiff here never moved for a new trial, on weight of the evidence or any other ground. This claim too, then, has not been preserved for appeal.

D. *Interstate Commerce as a Non-Jury Issue of Jurisdiction.*

[12] In its reply brief, appellant raises for the first time yet another alternative argument. Appellant claims that, because the interstate commerce element allegedly is "jurisdictional" in nature, it was error to submit any special question to the jury "where there was no factual conflict whatsoever." Appellant cites *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973), wherein the Ninth Circuit seemed to hold that the "jurisdictional" interstate commerce issue should never be submitted to the jury, even where the evidence is in dispute. *Id.* at 377.

This assertion has also been waived, because appellant raised it for the first time in its reply brief. See *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983). Even if appellant had timely raised the issue on appeal, however, this argument also was never made to the trial court. A party cannot be heard to complain in this court that the trial court should have made a preliminary determination of an issue rather than sending it to the jury if the party did not request such action from the court itself. *McGrath v. Spirito*, 733 F.2d 967, 969 (1st Cir. 1984) (waiver of request that trial court make preliminary determination of constitutionality of city council rule). Plaintiff therefore argues in the alternative that, because the question of interstate commerce is "jurisdictional," there can be no waiver on that issue. Appellant

insists that jurisdictional arguments can be raised at any time, despite numerous failures to preserve those arguments in the district court.

We reject both arguments. The interstate commerce question is not a strictly jurisdictional issue in the sense that appellant suggests. But even if it were, appellant's failure to preserve is dispositive.

In *Gough v. Rossmoor Corp.*, the Ninth Circuit decided that the interstate commerce question was "jurisdictional" rather than "substantive," and thus suggested that such a question should not be decided by the jury. *Id.* at 377. This characterization of the interstate commerce element as "jurisdictional" is not aberrant, for even Chief Justice Burger refers to it that way repeatedly in *McLain*. 444 U.S. at 234, 235, 237, 239, 240, 242, 243, 244, 245, 246, 100 S.Ct. at 505, 505, 506, 507, 508, 509, 509, 510, 510, 511. The genesis of such a practice seems to lie in the fact that without the requisite effect on interstate commerce, no Sherman Act violation can be proved, and without a Sherman Act violation in fact, there is no basis for this sort of action to be in *federal* court. The statute provides the basis for both the substantive claim and the federal subject matter jurisdiction.

This confluence of jurisdiction and substance "confuse[s] the issue of the district court's authority to hear a case with the issues of the adequacy of the complaint and the plaintiffs' ability to prevail on the merits of their claim." *Ortiz de Arroyo v. Barcelo,* 765 F.2d 275, 279 (1st Cir. 1985). "Subject matter jurisdiction does not depend on the plaintiffs' ability to prove the elements of their cause of action in their complaint." *Id.* This fundamental principle has been well-established from the time of the Supreme Court's seminal decision in *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Justice Black wrote:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on

> which [plaintiffs] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682, 66 S.Ct. at 776 (footnotes and citations omitted). *See also Cloutier v. Town of Epping*, 714 F.2d 1184, 1188 (1st Cir. 1983); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528-29 (1st Cir. 1983).

It is safe to say, therefore, that interstate commerce is not the sort of subject matter jurisdiction issue that is wholly independent of the factual elements of the substantive claim. In fact, they are so "closely intertwined" that it is unfair to characterize interstate commerce as "jurisdictional" at all, at least in the way that plaintiff now suggests.

Indeed, if the interstate commerce question were to be considered jurisdictional in nature, the plaintiff would have the burden of establishing the requisite facts supporting the pleading in response to a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). But on a motion to dismiss under Rule 12(b)(6) — for failure to state a claim — the plaintiff's pleadings are accepted as true for the purposes of the motion.

The Supreme Court has discouraged motions to dismiss on the interstate commerce ground, holding that plaintiffs should be given "ample opportunity for discovery" to establish the

factual predicates of the interstate commerce element. *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed.2d 338 (1976). More recently, the Court has suggested that summary judgment can also be a premature juncture for disposition of the interstate commerce question, explicitly assuming that it could be a jury question. *McLain,* 444 U.S. at 245, 100 S.Ct. at 510 ("it cannot be said that there is an insufficient basis for petitioners to proceed to trial to establish Sherman Act jurisdiction").[8]

E. *Waiver and Jurisdiction*

[13] As we demonstrate above, plaintiff is mistaken in characterizing the interstate commerce question as strictly "jurisdictional." But even were we to agree that interstate commerce is a jurisdictional question, appellant's agrument that such jurisdictional questions cannot be waived still fails, because appellant misconstrues the rule concerning jurisdiction and waiver discussed in *Eisler v. Stritzler,* 535 F.2d 148 (1st Cir. 1976). That rule holds that the absence of subject matter jurisdiction can be raised at any time in the litigation, regardless of waiver or stipulation. *See Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 106 S.Ct. 1326, 1331 & n. 4, 89 L.Ed.2d 501 (1986) and cases cited therein; *United States*

[8]The Ninth Circuit, in a long series of cases on this issue subsequent to *Gough*, has come to essentially the same conclusion, thereby undercutting the authority of *Gough* for Wells' contention. See *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.,* 711 F.2d 138, 139-40 (9th Cir 1983) (jurisdictional finding on motion to dismiss inappropriate when jurisdictional and substantive issues are so intertwined that one is dependent on the other); *Hasbrouck v. Texaco, Inc.,* 663 F.2d 930, 933-34 (9th Cir. 1981) ("jurisdictional issue" of whether sales were "in commerce" is "normally a fact question for the jury to resolve"); *Western Waste Service Systems v. Universal Waste Control,* 616 F.2d 1094, 1095-96 n. 1 (9th Cir. 1980); *Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.,* 594 F.2d 730, 733-35 & n. 10 (9th

ex. rel. P.J. Keating Co. v. Warren Corp., 805 F.2d 449, 451 (1st Cir. 1986) ("subject matter jurisdiction may be challenged at any time before the case is finally decided") (emphasis supplied); *Daley v. Town of New Durham*, 733 F.2d 4, 7 (1st Cir. 1984) ("defect" in subject matter jurisdiction cannot be cured by waiver or consent); Fed. R. Civ. P. 12(h)(3) (dismissal when court "lacks" jurisdiction). *See also Hydrogen Technology Corp. v. United States*, 831 F.2d 1155, 1162 n. 6 (1st Cir. 1987) (jurisdictional "defenses" cannot be waived). This exception to the strict rules of waiver is necessary to prevent federal courts from adjudicating cases over which they have no authority. The exception implicates an issue of the court's power. See *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702 (1951); *United States v. United States Fidelity Co.*, 309 U.S. 506, 514, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940); *Gilbert v. David*, 235 U.S. 561, 568, 35 S.Ct. 164, 166, 59 L.Ed. 360 (1915); Daley, 733 F.2d at 7 ("without subject matter jurisdiction, the court has no power to hear and decide the case"). This sort of jurisdictional bar to the court's power may be raised for the first time on appeal, or even by the appellate court or Supreme Court sua sponte. *Bender*, 106 S.Ct. at 1331; *City of Kenosha v. Bruno*, 412 U.S. 507, 511, 93 S.Ct. 2222, 2225, 37 L.Ed.2d 109 (1973) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908)); *Hydrogen Technology Corp.*, 831 F.2d at 1162 n. 6; Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the

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Cir. 1979); *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37 (9th Cir. 1978) (following *Gough)* (distinguished in *Thornhill*, 594 F.2d at 735); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 601-03 (9th Cir. 1976) (discouraging pre-trial dispositions of commerce issues).

For an early, thorough discussion of this problem in Sherman Act cases, see *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 890-96 (3d Cir. 1977).

parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

By contrast, appellant here asks us to decide that the court (and the factfinder) was mistaken in finding that subject matter jurisdiction did *not* exist. On Wells' view of "jurisdiction," the jury (incorrectly) decided, based on the court's (incorrect) special question, that the court lacked subject matter jurisdiction in the first instance. Despite its numerous waivers, Wells argues, this "jurisdictional" question can be reviewed at any time. This contention misconstrues the "unwaivability" rule. The court's final judgment that it did not have "jurisdiction" in no way means that the court was acting outside its power in entertaining the controversy. On the contrary. While not necessary to our decision because of our holding that the question is not strictly jurisdictional, we find that the jurisdictional exception to the waiver rule would nevertheless be inapposite here.[9]

Wells failed to preserve objections to: (1) the fact that the question went to the jury at all; (2) the nature of the question that was submitted to the jury; (3) the sufficiency of the evidence to support the jury's finding; and (4) a verdict allegedly against the clear weight of the evidence. The verdict of the jury therefore must be upheld, because the plaintiff has failed to establish the requisite degree of effect on interstate commerce.

III. THE TYING CLAIM

We turn now to the directed verdict for the defendants on appellant's tying claim. Appellant claims that conditioning

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[9] For instance, if a district court dismisses an action because the complaint fails adequately to allege federal jurisdiction, the plaintiff cannot receive relief in this court on another theory of jurisdiction that was not pleaded and not raised in the district court, despite the fact that the issue is undoubtedly "jurisdictional."

access to the MLS on membership in the Boards constituted an impermissible tying claim, illegal per se under the Sherman Act.

Tying arrangements involve the use of leverge over the market for one product (the "tying" product) to coerce purchases of a second product (the "tied" product). In this case, the MLS is the alleged "tying" product, and the Board membership is the ostensible "tied" product. The anticompetitive effect of an illegal tying arrangement takes place in the market for the tied product.

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S.Ct 1551, 1558, 80 L.Ed.2d 2 (1984). *See also id.* at 13 n. 19, 104 S.Ct. at 1558 n. 19 (quoting *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 512-14, 89 S.Ct. 1252, 1263-64, 22 L.Ed.2d 495 (1969) (Fortner I) (White, J., dissenting)) (explaining deleterious effect in tied product market).

[14] In order to show an illegal tying arrangement, a plaintiff must demonstrate three separate elements: (1) that an actual tie exists between two separate products, such that purchase of one is conditioned on purchase of the other; (2) that the seller has sufficient "market power" in the tying product to compel acceptance of the tied product; and (3) that the tie affects a "not insubstantial" amount of interstate commerce in the market for the tied product. See *Fortner I*, 394 U.S. at 498-501, 89 S.Ct. at 1256-58; *Northern Pacific Ry. Co. v.*

United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518-19, 2 L.Ed.2d 545 (1958); *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (1st Cir. 1984).

The district court dismissed Wells' tying claim on the theory that Wells had no standing to bring such a claim because it was neither a purchaser of nor a competitor in the market for the tied "product," real estate board memberships. We affirm the dismissal, but on alternative grounds.

[15] A plaintiff need not have actually consented to the purchase of the tying and tied products in order to bring a claim under the Sherman Act. *See, e.g., Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1033 (1st Cir. 1984) (after plaintiff backed out of the tying arrangement, defendant withdrew availability of tying product); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986) (rather than accede to alleged tying arrangement, plaintiff purchased alternative brands); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981) (plaintiff denied access to tying product after refusal to use tied product). It is less clear whether a plaintiff subject to a tie must have some interest in purchasing the tied product, i.e., whether a purchaser of the tying product is sufficiently injured merely by having to purchase an *unwanted* tied product. The Supreme Court has written that "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." Hyde, 466 U.S. at 16, 104 S.Ct. at 1560. Defendants invoked this passage as indicating that Wells had no tying claim because it was not a potential "purchaser" of board memberships.

[16] But we read the passage in question not as relevant to the issue of plaintiff's injury and standing to sue, but as regarding the plaintiffs' showing as to the "not insubstantial" volume

of commerce that is foreclosed by the tie. See *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1279 n. 1 (4th Cir. 1987). Otherwise, it would be impossible to reconcile the Supreme Court's language with the clear statement earlier in the same case that invalid tying exists where the buyer is forced "into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." 466 U.S. at 12, 104 S.Ct. at 1558 (emphasis supplied). In order to have standing, then, the plaintiff need only have been injured by the alleged anticompetitive act — it need not have been injured directly by the very anticompetitive effects sought to be remedied by the statute. The plaintiff must assert an "injury in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. This Wells has done.

[17] However, Wells' action is indeed fatally affected by the excerpt from *Hyde* quoted above. Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in.[10] The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product.[11]

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[10] Even if we were to find that Wells had sufficiently proven the requisite volume of commerce foreclosed, there is no reason to think that the jury's verdict on the interstate commerce element of the tying claim would have differed from those it rendered on the other claims.

[11] This is not to say that a plaintiff necessarily must prove the actual scope of anti-competitive effects in the market — the per se rule eliminates such a requirement. But the plaintiff must make some minimal showing of real or potential foreclosed commerce caused by the tie, if only as a matter of practical

We are also doubtful whether this situation constitutes a "tie" of separate "products" in the first place. We are unaware of any federal case that has characterized a multiple listing service as a tying arrangement.[12] *But see People v. National Ass'n of Realtors*, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728, 732-35 (1981) (applying state law tying doctrine to MLS); *People v. National Ass'n of Realtors*, 155 Cal.App.3d 578, 202 Cal. Rptr. 243, 247 (1984) (affirming trial court finding of illegal tying arrangement); *but compare People v. Colorado Springs Bd. of Realtors Inc.*, 692 P.2d 1055, 1065-67 (Colo. 1984) (en banc) (no tying arrangement in MLS under state law). The defendant boards are not "sellers" in the usual sense of the term, but rather a trade organization. The MLS is one of the advantages gained by joining that trade organization. Membership brings with it certain responsibilities as well. Whether or not it is subject to challenge on other antitrust grounds, such an arrangement is not a matter of invalid tying. Indeed, we have not been alerted to any federal case in which similar requirements and incentives of such an organization have been described as a tying arrangement. We need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above.

IV. DIRECTED VERDICTS IN THE COMPANION CASE

The district court directed verdicts for all of the defendant real estate boards in the 1973 case at the close of plaintiff's

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inferential common sense. Wells' real error here was in failing to show that there was a "market" at all for real estate board membership.

[12] Whether it is an unlawful group boycott or an illegal example of price-fixing is a much more complex question. See *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

evidence. Plaintiff appeals three of these verdicts, those in favor of the Greater Boston Eastern Middlesex, and Quincy/ South Shore Boards of Realtors.

Wells filed its complaint against these boards on June 19, 1973. The four-year statute of limitations prescribed by 15 U.S. C. § 15 limits Wells to damages sustained after June 19, 1969. Wells' sole office from 1969 onward was located in Billerica, within the provinces of the Greater Lowell Board. Wells did have offices in the Greater Boston and Eastern Middlesex areas prior to 1969, but closed them down permanently before the period applicable to this litigation. A wholly separate, thought related, corporation, Wells Real Estate Of Braintree, Inc., operated an office within the jurisdiction of the Quincy/South Shore Board in the mid-sixties. It too was shut down before 1969. Mr. Livadas claims to have closed at least some of these branch offices because of the futility of competing with the allegedly illegal MLSs of the local boards. Wells sold a handful of houses in the Greater Boston and Eastern Middlesex areas after 1969, but the overwhelming preponderance of its business was concentrated in the Greater Lowell area.

[18] We wholeheartedly agree with the trial court's dismissal of the claims against these defendants for the reasons articulated by the court. There was no evidence of a group boycott by the three boards against Wells. While it may have been futile for Wells to request access to the MLSs in those areas without agreeing to join the boards, Wells never asked for such access under any conditions. Indeed, there was some evidence that Mr. Livadas did not desire access to the MLSs — he merely wished to eliminate them. Appellant never complained to defendants, either formally or informally, about the conditions, rules, or practices attendant to the MLSs. No occasion existed for the defendants to have boycotted Wells.

The only evidence of conspiracy to monopolize seems to have been the boards' membership in the state and national

associations. The district court correctly noted that this is not, in and of itself, sufficient to establish an illegal conspiracy to monopolize. *See Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981). Unlike in the case of the 1972 defendants, there was no evidence admitted concerning commission splits, fixed commission rates, etc. The jury could not reasonably have found a conspiracy to monopolize on the basis of the scanty evidence in the record regarding these defendants. Nor could the jury have found an improper tying arrangement, for the reasons discussed in Section III, *supra*.

[19] Neither was there any dispositive evidence regarding what Wells' damages might have been as a result of the alleged boycott and conspiracy. The jury may have been able to decide that *without* the MLSs, Wells might have cornered a greater share of the markets in the three areas in question, but the district court properly found that specific damages would have been completely speculative. Although "a private antitrust litigant is not required to prove the amount of its damages with mathematical certainty . . ., this guiding principle does not shift the burden of proof and . . . it is proper to indulge private antitrust plaintiffs only to the extent that there is evidence on the record from which a trier of fact could make a 'just and reasonable inference' regarding the amount of damages. If the plaintiff's proffered evidence permits no more than 'pure speculation and guesswork,' then the damage evidence is insufficient as a matter of law." *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205 (1st Cir. 1987) (citations omitted) (quoting *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1062 (1st Cir. 1985) (in turn quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L.Ed 652 (1946)).

The jury in this case had only Mr. Livadas' testimony that he might have continued to expand his business in those areas

but for the growth of the MLSs. Wells made almost no attempt to retain any sort of market share in the areas in question. Even were we to assume that there was sufficient evidence of boycott and/or conspiracy, there is no way to draw any connection between those activities and Wells' injuries without "pure speculation and guesswork."

Finally, even if boycott and monopoly had been established by the plaintiff, there is no reason to think that the jury would have decided any differently in the 1973 case than it did in the 1972 case with regard to effect on interstate commerce. In fact, less evidence was presented regarding the scope of these defendants' activities.

V. MISCELLANEOUS ISSUES

Appellant offers several additional arguments regarding alleged errors made by the district court on various matters of discovery and evidence. We have examined closely each of the contested decisions, and we find that the district court was well within its discretion on each of the matters in question.

Moreover, even if every one of the discovery and evidentiary rulings had been erroneous, their cumulative effect would have been immaterial. Not a single one of them, nor all of them combined, had the slightest impact on the plaintiff's failure to establish the necessary effect on interstate commerce. That issue, as we have explained above, is dispositive in this case.

VI. CONCLUSION

For the foregoing reasons we decline to upset the verdicts.

Affirmed.

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 87-1238

WELLS REAL ESTATE, INC.,
Plaintiff, Appellant,

v.

GREATER LOWELL BOARD OF REALTORS, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: June 23, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Cavers, Harrington, Dinsmoor and Ms. Olsen]

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WELLS REAL ESTATE

v. Civil Action Nos. 72-1656-Mc
73-1925-Mc

GREATER LOWELL BOARD OF
REALTORS, ET AL.,

SPECIAL QUESTIONS FOR THE JURY

1. Did any defendant knowingly participate in an agreement with others to deny Wells (or Mr. Livadas) unreasonably, access to the Greater Lowell Board of Realtors' multiple listing service?

YES NO ☑

1A. If your answer to #1 is "YES" please identify such defendants by putting a check mark next to the appropriate names on the attached list.

2. If your answer to #1 was "YES" did defendants, two or more, engage in acts or practices which denied Wells access to the Greater Lowell Board of Realtors' multiple listing service?

YES ☑ NO

2A. If your answer to #2 is "YES", please identify such defendants by putting an "X" next to the appropriate names on the attached list.

3. Did the activities of two or more defendants cause a substantial reduction in competition among real estate brokers in the market in which Wells Real Estate operated?

YES ☑ NO

3A. If your answer to #3 was "YES", please identify the defendants by circling their names.

4. If your answer to question #3 was "YES", did such acts or practices unreasonably restrain a substantial amount of commerce between the States?

YES NO ☑

5. Was any one or more of the following a cause of the decline and demise of Wells Real Estate?

A. Wells' own conduct?

YES ☑ NO

If "YES" was it a predominant cause?

YES NO ☑

B. Denial, unreasonably, of access to the MLS?

YES ☑ NO

If "YES" was it a predominant cause?

YES NO ☑

C. Increased competition among brokers in the real estate market?

YES NO ☑

If "YES" was it a predominant cause?

YES NO

END OF PART I

SPECIAL QUESTIONS TO THE JURY - PART II

6. Did any defendant knowingly participate in an agreement with others to exclude real estate brokers, unreasonably, from competing in the relevant market for real estate brokerage services?

YES ☑ NO

6A. If your answer to #6 is "YES", please identify such defendants by putting a check mark next to the appropriate name on the list attached as "B" list.

7. If your answer to #6 was "YES" did such defendants participate in the agreement with the specific intent of achieving a monopoly in the relevant market for real estate brokerage services?

YES NO ☑

7A. If your answer to #7 was "YES", please identify such defendants by placing an "X" next to the appropriate name on List B.

8. Did such defendant(s) commit any overt act(s) in furtherance of the agreement to exclude real estate brokers and achieve a monopoly in the relevant market for real estate brokerage services?

YES ☑ NO

8A. If your answer to #8 was "YES" please identify such defendant(s) by circling the name(s) on List B.

9. Did the exclusion of any real estate brokers from the relevant market for real estate brokerage services substantially affect commerce between the States?

YES NO ☑

10. Was any one or more of the following a cause of the decline and demise of Wells real estate?

A. Wells' own conduct?

YES ☑ NO

If your answer is "YES", was it a predominant cause?

YES NO ☑

B. Agreement among defendants to achieve a monopoly?

YES NO ☑

If your answer is "YES", was it a predominant cause?

YES NO

C. Increased competition among brokers in the real estate brokerage market?

YES NO ☑

If your answer is "YES" was it a predominant cause?

YES NO

11. Was participation in the MLS required for plaintiff to compete effectively in the real estate brokerage market?

YES ☑ NO

Robert S. Savage

Date:

LIST A

(Questions 1 to 5)

Defendants

—National Association of Realtors
—Massachusetts Association of Realtors
—Greater Lowell Board of Realtors, Inc
☒ Walter W. Arakelian d/b/a Arakelian Real Estate
☒ William D. Atherton Realty Corp
☒ George C. Ayotte d/b/a Ayotte Real Estate
☒ Francis M. Bakkar
☒ John Banacos d/b/a Banacos Real Estate
☒ Walter E. Bartkus d/b/a Bartkus Real Estate
☒ Gloria J. Brown d/b/a/ Gloria Brown Associates
☒ Buckingham Real Estate, Inc.
☒ James A. Burns, Jr.
☒ Gilbert G. Campbell, Inc.
☒ Richard A. Geiger d/b/a/ Cape Real Estate
☒ Edward F. Chambers d/b/a/ Chambers Real Estate
☒ Roger Clermont
☒ James A. Kintigos d/b/a/ Colonial Real Estate Co.
☒ Dave Councilman d/b/a/ Dave Councilman & Co.
☒ Ellis Davis d/b/a Davis Realty
☒ Martin F. Delmore d/b/a/ Martin Delmore Real Estate & Insurance.
☒ Gail Downing d/b/a Downing Real Estate
☒ Ann Marie Dube d/b/a/ Marie Dube Real Estate
☒ George R. Dupee d/b/a/ George R. Dupee Real Estate & Insurance.
☒ Bradford O. Emerson, Inc.
☒ Peter DeMogenes d/b/a Garrison Real Estate

☒ Rene E. Gendreau
☒ Peter J. Georges d/b/a Peter J. Georges Real Estate & Insurance
☒ T. J. Higgins Insurance Agency, Inc.
☒ Frank E. Jackson Realty, Inc.
☒ Henrick F. Johnson
☒ Roy T. Johnson
☒ Anne R. Jones
☒ John J. Lowrey
☒ C.A. Mack Assoc., Inc.
☒ Peter Markham
☒ Arthur E. McGlinchy
☒ George D. Meservey d/b/a George D. Meservey Associates
☒ W.C. Muldoon d/b/a W.C. Muldoon Realty
☒ Musket Realty, Inc.
☒ Newsham Real Estate, Inc.
☒ Robert L. O'Brien d/b/a/ O'Brien Real Estate
☒ J.J. Reardon d/b/a J.J. Reardon Insurance & Real Estate Agency
☒ Lawrence A. Ross and Dorothy M. Ross d/b/a Ross Real & Insurance Agency
☒ Howard N. Sager d/b/a Sager Real Estate
☒ J.R. Saran d/b/a J.R. Saran & Co.
☒ Francis W. Stecchi d/b/a Francis W. Stecchi Real Estate
☒ Douglas R. Johnston d/b/a/ Stony Brook Realty
☒ Edward J. Talbot, Jr. d/b/a Talbot Insurance & Real Estate
☒ Van Greenby Realty Sales, Inc.
☒ Roger P. Welch
☒ Terry Witt d/b/a Terry Witt Realty

LIST B

(Questions 6 to end)

Defendants

— National Association of Realtors
— Massachusetts Association of Realtors
☒ Greater Lowell Board of Realtors, Inc.
☒ Walter W. Arakelian d/b/a Arakelian Real Estate
☒ William D. Atherton Realty Corp.
☒ George C. Ayotte d/b/a Ayotte Real Estate
☒ Francis M. Bakkar
☒ John Banacos d/b/a Banacos Real Estate
☒ Walter E. Bartkus d/b/a Bartkus Real Estate
☒ Gloria J. Brown d/b/a/ Gloria Brown Associates
☒ Buckingham Real Estate, Inc.
☒ James A. Burns, Jr.
☒ Gilbert G. Campbell, Inc.
☒ Richard A. Geiger d/b/a/ Cape Real Estate
☒ Edward F. Chambers d/b/a/ Chambers Real Estate
☒ Roger Clermont
☒ James A. Kintigos d/b/a/ Colonial Real Estate Co.
☒ Dave Councilman d/b/a/ Dave Councilman & Co.
☒ Ellis Davis d/b/a Davis Realty
☒ Martin F. Delmore d/b/a/ Martin Delmore Real Estate & Insurance
☒ Gail Downing d/b/a Downing Real Estate
☒ Ann Marie Dube d/b/a/ Marie Dube Real Estate
☒ George R. Dupee d/b/a/ George R. Dupee Real Estate & Insurance
☒ Bradford O. Emerson, Inc.
☒ Peter DeMogenes d/b/a Garrison Real Estate

☒ Rene E. Gendreau
☒ Peter J. Georges d/b/a Peter J. Georges Real Estate & Insurance
☒ T.J. Higgins Insurance Agency, Inc.
☒ Frank E. Jackson Realty, Inc.
☒ Henrick F. Johnson
☒ Roy T. Johnson
☒ Anne R. Jones
☒ John J. Lowrey
☒ C.A. Mack Assoc., Inc.
☒ Peter Markham
☒ Arthur E. McGlinchy
☒ George D. Meservey d/b/a/ George D. Meservey Associates
☒ W.C. Muldoon d/b/a W.C. Muldoon Realty
☒ Musket Realty, Inc.
☒ Newsham Real Estate, Inc.
☒ Robert L. O'Brien d/b/a O'Brien Real Estate
☒ J.J. Reardon d/b/a J.J. Reardon Insurance & Real Estate Agency
☒ Lawrence A. Ross and Dorothy M. Ross d/b/a Ross Real & Insurance Agency
☒ Howard N. Sager d/b/a Sager Real Estate
☒ J. R. Saran d/b/a J.R. Saran & Co.
☒ Francis W. Stecchi d/b/a Francis W. Stecchi Real Estate
☒ Douglas R. Johnson d/b/a Stony Brook Realty
☒ Edward J. Talbot, Jr. d/b/a Talbot Insurance & Real Estate
☒ Van Greenby Realty Sales, Inc.
☒ Roger P. Welch
☒ Terry Witt d/b/a Terry Witt Realty

Appendix C.

Volume 28-1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WELLS REAL ESTATE, INC.,
Plaintiff,

vs.

CA-72-1656-Mc
CA-73-1925-Mc

LOWELL BOARD OF REALTORS,
and GREATER BOSTON REALTORS,
Defendant.

Twenty-eighth day of trial

BEFORE THE HONORABLE JOHN J. McNAUGHT
United States District Judge, and a jury.

Courtroom 12
U.S.P.O. & Courthouse
Boston, Massachusetts
February 23, 1987

APPEARANCES
For the plaintiff
DAVID F. CAVERS, JR., ESQ.
RICHARD W. MABLE, ESQ.
Powers & Hall
100 Franklin Street, Boston, MA 02110

For the Defendant National Association of Realtors
JOHN M. HARRINGTON, JR., ESQ.
Ropes & Gray
225 Franklin Street, Boston, MA 02110

For the Defendant Mass. Association of Realtors
DAVID M. ROSEMAN, ESQ.
Casner, Edwards & Roseman
30 Federal Street, Boston, MA 02110

For the Defendants Lowell Greater Board of Realtors, Inc. and its individual members
THEODORE E. DINSMORE, ESQ.
Gaston Snow & Ely Bartlett
One Federal Street, Boston, MA 02110

JANE B. GRIFFITH, Official Reporter, U.S. District Court

. . . . . .

[V. 28-58] elements of a theory of liability in order to recover.

Now, I'll say that again. We are not sitting on the criminal side of the court here, so I am not talking beyond reasonable doubt or anything like that. On the criminal side, if any of you have sat there, you've had the judge say to you that the prosecutor has to prove each and every essential element of the crime charged beyond a reasonable doubt, and the judge goes to explain beyond a reasonable doubt is. Not so here. You are interested here only in proof in the sense that you are persuaded that thing is more likely so than not.

In other words, if you are persuaded in terms of probabilities on the existence of a particular element of a theory of liability, then the plaintiff has carried his burden in that regard. You do not have to be persuaded beyond a reasonable doubt in order to find for the party who has the burden of proof on a particular issue.

I guess I had better get down to discussing what those issues are. It gets a little tiring standing here, so if you don't mind I'll sit, also.

First, a word of caution. Now, you have been told by Mr. Cavers in his argument that what you do in this case is going to affect other persons and other areas of the country. It's my duty to instruct you that you may not consider that argument which has been made by Mr. Cavers. **[V. 28-59]** You are not interested in what happens anywhere except in this area with which we are involved in this case and only with the persons in this case. It is not for you to send a message to anyone. It's for you to decide this case and this case only.

Why? What happens in Chicago or what will happen in Florida or Los Angeles or any place else has not been the subject of evidence before you. You must not, then, become involved in speculation as to what may or may not occur elsewhere. That is not your business. You are concerned not with what will happen in the future. You are concerned on the evidence in this case with what happened in the past in what I will call the relevant market involving only the persons and the entities who are parties to this action.

Now, the phrase "relevant market" refers to a product or a service and to a particular geographic area only, generally in the area of Lowell, Massachusetts. And I will go through that subject with you again at a later point.

Mr. Livadas or, more properly, Wells Real Estate seeks damage to a business in this case which is claimed to have been suffered or sustained by alleged violations of the defendants of the antitrust laws of the United States. One of those laws is called the Sherman Antitrust Act, which is to be found in a title of the United States Code, 15 United States Code, Section 1, and that provides in part, and I **[V. 28-60]** quote: "Every contract, combination or conspiracy in restraint of trade or commerce is illegal."

Section 2 of the same act, the Sherman Antitrust Act, provides: "Every person who shall monopolize or conspire with

any other person to monopolize any part of the trade or commerce violates the antitrust laws."

So you have Section 1 and Section 2 of the Sherman Act.

One other portion of the antitrust laws you are intersted in. This is called the Clayton Act, to be found in Title 15 of the United States Code at Section 15. That provides in pertinent part that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore."

So those are our three pertinent provisions. Keep in mind, however, that when they speak about a person in the antitrust laws, that includes not only an individual; it includes a corporation, a partnership, or any kind of organization of human beings.

The purpose of the antitrust laws is the protection of competition; not the protection of competitors, but the protection of competition. Its purpose is to prevent the accomplishment of an unlawful monopoly in any business, so that the public, the consumers, may receive goods and services which are better at a lower cost.

[V. 28-61] Here, then, is the principle which will guide you: Any unreasonable interference with a competitive open market in interstate trade and commerce constitutes an unreasonable restraint of trade. Such a restraint of interstate trade is unlawful. Interstate trade and commerce is that which takes place between persons or organizations in one state and in another state; that is, trade or commerce which is not confined wholly to one state. To restrain interstate commerce means, then, to interfere unreasonably with the free competitive system of the open market in interstate commerce. The amount of the commerce involved or affected by such a restraint has to be more than inconsequential, but it is enough for a violation if you can label it not insubstantial.

In this particular case Wells Real Estate advances two theories, two bases on which it says it is entitled to prevail in its antitrust claim, and the first of those has been labeled by the attorneys in this case the claim of boycott.

The plaintiff, then, contends that the defendants were engaged in what we call a boycott; that is, an exclusionary practice whereby they conspire unlawfully to deny to Wells Real Estate access to Multiple **[V. 28-62]** Listing Services. That is the claim of the plaintiff, the defendants engaged in an exclusionary practice whereby they conspired unlawfully to deny to Wells Real Estate access to Multiple Listing Services.

So you must ask yourselves the first major question, did the defendants, any two or more of them, act in concert or together to deny unreasonably to Wells participation in Multiple Listing Services?

Next there is another question, concerning the alleged activities of the defendants, two or more of them, did their conduct unreasonably restrain or suppress competition? In determining the answer you will consider the facts peculiar to the real estate brokerage profession. Consider the nature of the activities which the plaintiff said restrained him from competing with the members of the MLS. If there was a restraint and if that restraint had a substantially adverse effect on competition, the restraint was unreasonable.

I'll repeat that for you. If there was a restraint and if that restraint had a substantially adverse effect on competition, it was unreasonable. You are to determine, then, did the activity of the defendants by reason of agreement among two or more of them lessen competition in the area of what we will call effective competition? Did their activity unreasonably affect the residential real estate brokerage field in the relevant market? And was that to the detriment of purchasers of residential real estate? If your answer is No, then the plaintiff cannot recover.

[V. 28-63] Keep in mind, then, that the plaintiff has to determine by the preponderance of the evidence concerted action which brought about a restraint that tends or is reasonably calculated to prejudice the public interest and, as well, affected the plaintiff's business adversely.

I want you to remember this. The relevant market involves a service and an area. In this case the service in which the plaintiff and the realtors were competing.

Geographically the market covers that area which was serviced by the MLS of the Greater Lowell Board of Realtors. You have heard so many of them, I find it difficult to remember now.

So that is the boycott claim. It asserts unlawful exclusion of a nonparticipating licensed broker from Multiple Listing Service, the service being the sale of residences through a broker and only those through a broker. We are not interested in the sale of residences by the owners themselves or the sale of lots without houses upon them or the sale of commercial real estate. The service with which you are concerned here is the service normally performed by a broker in the sale of residences only.

So it is asserted that there was an unlawful exclusion of a nonparticipating licensed broker from Multiple Listing Services. That being so, the essential elements of the plaintiff's claim, and it is up [*sic*] plaintiff to persuade you by a fair perponderance of the credible, cogent, trustworthy **[V. 28-64]** evidence in terms of probabilities, No. 1, that he was excluded from that service; No. 2, that the exclusion was unreasonable; No. 3, that the policy of exclusion affected interstate commerce not insubstantially; and No. 4, that the business of Wells Real Estate was injured thereby.

Now, plaintiff offers you a second theory, a different perspective or, if you will, a second string to the bow, claiming that the defendants, two or more, entered into a conspiracy. A conspiracy is an agreement or combination between two or more people to achieve an illegal goal or a legal goal by illegal means.

There has to be at least two entities involved, two human beings or one human being and another type of entity. So keep in mind for a combination or an agreement there has to be at least two people who get together. They agree to achieve an objective.

Agreements don't have to be in writing. They can be tacit, understood, evidenced by way of conduct. But the agreement between the two must be to achieve an illegal objective, and in this particular case the plaintiff says there was a combination between two or more people that they knowingly got together to do what the law forbids them to do, and that is to monopolize a product market in a relevant geographic area which affected interstate commerce, and their goal was to exclude or destroy competition. I'll repeat that **[V. 28-65]** for you.

The essential elements are the plaintiff was excluded; No. 2, that the exclusion was unreasonable; No. 3, that that policy of exclusion affected interstate commerce not insubstantially; and No. 4, that the plaintiff was injured thereby.

So the plaintiff says, and for the plaintiff to prevail you must find in probabilities that there was a combination; that the persons who entered into that combination, known as conspirators, knowingly, intentially got together to do what the law forbids; that is, to monopolize a product market in a relevant geographic area affecting interstate commerce to exclude or destroy competition.

I have used the adverb "knowingly." I have said that to be a party to a conspiracy one must enter into an agreement knowingly. They cannot do it accidentally. They must be aware of their surroundings and know what they are doing at the time. Keep in mind, however, it is possible for me to fact [*sic*] similarly to another person. Or to approve of another person's actions without combining or agreeing with that person that we'll get together to achieve a particular goal.

So the plaintiff to recover on this second theory called monopoly must show, No. 1, there was an agreement; No. **[V. 28-66]** 2, a given defendant was a party to that agreement knowingly; and No. 3, that the goal was unlawful.

There are over 50 defendants in this case. And each person who is charged has to be considered separately by you. The evidence as to each of them is to be considered separately by you. The acts and statements of each of them have to be taken into consideration to determine whether or not that particular person or entity was actually part of a conspiracy.

Now, keep in mind that not all combinations or conspiracies are condemned by the antitrust laws. A conspiracy is unlawful if it causally and unreasonably affects commerce among the states and tends to deprive consumers of the benefit of free competition. I repeat, that harm to a competitor is not the test. Harm to competition is the test. If a restraint enhances competition among people, it is not unlawful. As I said before, you are to look at the profession involved, look to the nature of the claimed restraint and the reasons for the practice which is alleged to constitute a restraint.

If the restraint charged — and here the restraint charged is ai [*sic*] limitation an [*sic*] access to Multiple Listing Services to members of a Real Estate Board — if that restraint is reasonable, then you must find for the defendants. If that restraint is

unreasonable, as I have **[V. 28-67]** defined it for you, you would then have to determine whether the unreasonable restraint damaged the business of the plaintiff to any degree.

If an agreement or a combination improves a profession rather than injuries it, if it enhances the competence of its members, if it works to the advantage of the consuming public thereby, it is not unlawful. So you have to determine whether the plaintiff has persuaded you by a preponderance of the evidence, No. 1, that a given defendant was a knowing participant in a conspiracy who had the intent specifically to achieve an illegal objective.

You would have to determine, secondly, whether the object of the conspiracy was to monopolize listings of residential homes for sale for the benefit of the members who chose to participate in a Multiple Listing Service.

You have to determine, third, if the agreement was unreasonable as I have defined that term for you; that is whether it was an unreasonable restraint of trade. And if you find those in the affirmative, then you have to find whether that was a predominant case of damage to the plaintiff's business.

Let's assume that you find that there was a conspiracy to monopolize listings and that the agreement was an unreasonable restraint of trade. You would have to determine whether it was that fact which caused the damage to **[V. 28-68]** the plaintiff's business predominantly. We may have any of a number of causes contributing to a particular effect, but a cause is not predominant if it is only incidental. It is predominant if it is the adequate, efficient, producing cause. Then we call it a predominant cause.

One of your problems is going to be in determining whether a restraint is reasonable. I've said before you may consider whether the limitation imposed restricts unnecessarily certain

activity to members of the agreement or to a combination in a trade or profession. You may consider whether the limitation works to the advantage or to the disadvantage of one or more members of the profession. You may consider whether the limitations here, the limitation on access to MLS, enhances or furthers honesty or ethics in the profession or damages it. You may consider whether the practices or activity of the MLS helps create a favorable business reputation for the profession or damages it or works to the advantage of the general public or to its disadvantage.

For weeks now you have been listening to the parties. I suggest to you that the plaintiff has asserted that the restriction was unreasonable, that a broker was denied access to the MLS unless he became a member of a real estate board, that that adversely affected the interests of the general public and interstate commerce and, as such, it **[V. 28-69]** was unreasonable.

And I suggest to you that the defendants have alleged just as forcefully that the proof is otherwise. They say there is no evidence in this case that the plaintiff ever was denied membership in either of the organizations involved or any of the organizations involved because the plaintiff never applied for it.

Secondly, the defendants say that even if he could participate or could not participate in the MLS activity, the agreement of the members of the Greater Lawrence [sic] Board did not restrain trade, and that even if there was restraint, that was a reasonable one.

So you have to decide the issues, whether the plaintiff should prevail on either or both of the two theories of liability or whether the plaintiff has failed in his proof. Which way you decide is up to you. That is not my decision to make. But for the remainder of the remarks I have to make to you I have to

assume that you have decided the antitrust issues in favor of the plaintiff. I do not say that you should. I simply must make that assumption in order to put a further question to you.

If you decide the antitrust issues in favor of the plaintiff, you have to decide whether the plaintiff's business was damaged thereby. Remember I talked about the predominant cause. If Wells Real Estate's business operation was damaged in order to be compensable the damage must have been predominantly caused by the antitrust relations. If a loss by Wells Real Estate, however, was due to other factors, if the other factors predominated, be it the business climate or a change in the market or the conduct of its managers, then you would have to find for the defendants, because one of the essential elements of the theory of liability would not have been created.

You are going to have to determine answers to questions which will be submitted to you, and you've seen them in one form up on the board. Once we have those answers, I, along with the attorneys, will study them and, indeed, will inform you of the legal effect of those answers. We don't want you to go any further. Even if you find that the plaintiff suffered damages, we do not want you to determine the amount of those damages presently. Clear? We only want to know whether damage was sustained, not the amount of it.

Mary is going to pass out to each of you a set of these questions. You may write all over them, do whatever you wish to them because they are worksheets for each of you.

. . . . . .

Appendix D.

Volume 14-1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WELLS REAL ESTATE,	:	
Plaintiff,	:	
vs.	:	CA-72-1656-Mc
	:	CA-73-1925-Mc
LOWELL BOARD OF REALTORS,	:	
and GREATER BOSTON REALTORS,	:	
Defendant	:	

14th day of trial

BEFORE THE HONORABLE JOHN J. McNAUGHT
United States District Judge, and a jury.

Courtroom 12
U.S.P.O. & Courthouse
Boston, Massachusetts
January 28, 1986

APPEARANCES
For the plaintiff
DAVID F. CAVERS, JR., ESQ.
RICHARD W. MABLE, ESQ.
Powers & Hall
100 Franklin Street, Boston, Ma 02110

For the Defendant National Association of Realtors
JOHN M. HARRINGTON, JR., ESQ.
Ropes & Gray
225 Franklin Street, Boston, Ma 02110

. . . . . .

[V. 14-84] Q. Tell us the reason or reasons why you did not oppose a multiple listing service?
A. I'm sorry. I didn't understand.
Q. Why didn't you oppose the concept, the idea of a multiple listing service?
A. Why I did not oppose?
Q. Yes. Why did you favor it?
A. Because I think the multiple listing service if it is run properly it is very good for the broker and also for the homeowners and also for the buyers.
Q. Just briefly, please, tell us why in your judgment it's good for the brokers?
A. Because you have a large number of brokers trying to sell a specific house, which gives, makes it easier to sell the property. And you have a collection of listings of many brokers to service a potential customer, which makes it easier for that client to buy a house.
Q. To buy a house.
Q. Are the reasons the same in reference to the homeowner why you favor an MLS?
A. Yes, the MLS is good for the homeowner. It's good for the buyer. It's good for the broker.
Q. Did you ever participate, Mr. Livadas, in any discussions with any realtors concerning commencement of a competing MLS to compete with the Lowell MLS?
[V. 14-85] A. Yes, sir.
Q. And when did that or those discussions take place?
A. If my memory helps me, it was either '72 or '73.
Q. And where did it take place?
A. I was invited to a luncheon by five realtors, members of the Lowell Board of Realtors, in a Billerica restaurant.
Q. Who was present when [*sic*] arrived there?

A. I very clearly remember Mr. James Kintygos, member then of the Lowell Board of Realtors; a Mr. George Meservey, member of the Lowell Board of Realtors in the State Association and all those trade associations at the time; and Mr. Walter Arakelian; and two more, but I don't remember their names. There were five and I was the sixth person.

Q. Now, on the subject you identified of MLS, tell us what was said as best you can recall on that subject matter by the people attending that meeting?

Mr. HARRINGTON: Objection.

Mr. ROSEMAN: Objection.

Mr. DINSMORE: Objection.

Mr. ROSSMAN: Objection.

Ms. FAHEY: Objection.

THE COURT: Sustained.

MR. CAVERS: May I approach the bench on that, your Honor?

THE COURT: You want to make an offer of proof to **[V. 14-86]** the record?

MR. CAVERS: Yes.

In fact, if I could ask one more question which he will not answer, I can put it together.

THE COURT: All right, ask one more question which he will not answer.

MR. CAVERS: Don't answer it, Mr. Livadas.

Q. Was the subject of a competing association of real estate brokers competing with the Greater Lowell Board also discussed at that meeting?

THE COURT: Don't answer and let's come up.

AT THE BENCH

MR. CAVERS: Each of the gentlemen identified at that meeting by Mr. Livadas, Mr. Kintygos, Mr. Arakelian and Mr. Meser-

vey are defendants in the Greater Lowell action and were realtor members of the MLS and therefore the conversation offered in admission, Mr. Livadas if permitted to testify, there were discussion involving himself, those three and the two whose names he can not remember concerning starting a competing multiple listing service, that is, a multiple listing service competing with Lowell's multiple listing service.

And that further following the second question there was also discussion of starting a competing board or **[V. 14-87]** association, if you will, of licensed real estate brokers in that Greter Lowell area.

THE COURT: What do you say about who said what?

MR. CAVERS: Mr. Kintygos apparently took the lead on that. Mr. Kintygos expressed dissatisfaction in terms of rigidity or dictatorialship, I think is the word, of rules of the Greater Lowell MLS as a reason for wanting to establish it. Mr. Livadas would say in respect to both — and I have an exhibit to offer if permitted on the —

THE COURT: Let's get the conversation first. Then Livadas said what?

MR. CAVERS: Livadas said in effect look, I'm not against you. Go ahead and start it and if it gets under way, if it gets going I'll then join you.

THE COURT: In other words, he himself would join a real estate board?

MR. CAVERS: He would join this competing board and the MLS that it was —

THE COURT: What does that prove here?

MR. CAVERS: The purpose, your Honor, is to show, No. 1, that Mr. Livadas was not opposed — and we have had some testimony on that, I agree — opposed to multiple listing as such. He was opposed to the requirement and conditions of the Lowell Board on its MLS and the other defendants.

[V. 14-88] The second and perhaps more technical thing inferentially on the first point also that it seems to me to demonstrate the power of the Greater Lowell MLS that even these people participating in it did not, were not able to start one going, a new one, a competing MLS.

Secondly, the competing board or asociation of realtors that they talked about, which bore the name for a period Associated Brokers of America, didn't get off the ground. But it tried to get off the ground and tried to run ads. And if the subject, which I disagree with, but if the subject of a competing board competing with the Lowell Board for members for a real estate board is important or critical to the time claim as at least the defendants seem to allege, that would show there was competition for the market, however brief, for membership in the association of real estate brokers.

THE COURT: I have a lot of difficulty here. But I am going to keep my mouth shut and hear from the defendants in the order in which they handle cross-examination.

Mr. Harrington, you usually start things off.

MR. HARRINGTON: I just don't see the relevance of any of this. As I understand it, this man has already testified that he liked the concept of MLS. I'm not sure that this meeting does anything, and involves a lot of hearsay as to what these people said —

[V. 14-89] THE COURT: Let's assume that these people are defendants in this case and that therefore if they say something contrary to their interest in this case, that it constitutes an admission.

MR. HARRINGTON: But it hasn't been suggested that they would say anthing and it would not be an admission as against anybody but them, I suggest, which gets us into another —

THE COURT: That's true. He is only offering it against them.

MR. CAVERS: I agree with that.

MR. HARRINGTON: And why, — it strikes me without calling them to the stand, it's going to be quite impossible to know why they never went forward with their project.

MR. CAVERS: We could. I just didn't want to prolong it.

MR. HARRINGTON: That is dangling. The fact they had a meeting and they didn't go forward with it. That could have been for a thousand reasons.

THE COURT: Do you represent those three people?

MR. HARRINGTON: No I do not.

THE COURT: Who represents those three people?

MR. DINSMORE: I do.

THE COURT: What do you say?

MR. DINSMORE: Aside from all the hearsay that I **[V. 14-90]** think that this constitutes, I would start with Mr. Harrington's objection. It appears what Mr. Cavers is trying to offer this as proof that somebody at some time discussed the possibility of starting some competitive MLS. Whether or not there was a discussion it seems pretty clear that it never got off the ground and never did anything that it talked about. It is pure speculation as to what might have occurred and what Mr. Livadas might of done if something indeed might have occurred, which never did occur.

THE COURT: It seems to me you are offering a statement by three named defendants that they were dissatisfied with the Greater Lowell Real Estate Board as it was being run and that they decided that they would at least make an effort toward setting up a competing real estate board. And for the life of me, No 1, I can't understand what it has to do with this case. At least, I don't see any relevance to any of the issues. No. 2, I think if I opened that up we would be trying a separate case as to whether the fact that these people may or may not have wanted to set up a competing real estate board bears upon

the validity or conspiracy, monopolization or tie-in charges that you have here, we would be trying another case. I don't see how it benefits Mr. Livadas.

MR. CAVERS: Well, your Honor —

[V. 14-91] THE COURT: I can't understand why are offering it.

Why are you offering it anyway?

MR. CAVERS: Mr. Dinsmore for Greater Lowell has argued repeatedly at length that there is no market for alleged tie-in tide product, that is, membership in the Greater Lowell Board. Well, if that is true as a requirement, which I disagree with, but if it is, the existence, however brief and however unsuccessful of a competing association of real estate brokers competing with that Lowell Board creates a market —

THE COURT: Did they ever set up a competing board?

MR. CAVERS: No.

MR. DINSMORE: No.

MR. CAVERS: I have an advertisement they did set up a board, your Honor.

THE COURT: I'm going to sustain the objection to it. I think it's trying another case altogether, which I don't want to do. We have enough difficulty trying the case now.

OPEN COURT

THE COURT: We are going to take a recess and we'll resume in ten minutes.

(There was a recess.)